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# THE NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

*NORTHERN IRELAND*

EDITED BY

**FRANCIS NEWARK,**

BARRISTER-AT-LAW

## 1954

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## Lords Justices of Appeal:

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THE RIGHT HON. ARTHUR BLACK.

## Chancery Division:

THE HON. LANCELOT ERNEST CURRAN.

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# CASES

DETERMINED BY

# THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

# THE COURT OF APPEAL

IN

# NORTHERN IRELAND

## IN RE SERGIE, DECEASED.

## SHRIBMAN AND OTHERS v. HALL AND OTHERS (1)

*Will—Construction—Direction for payment of "death duties" out of residue—Some legacies expressed to be "free of legacy duty"—Whether estate duty payable on realty specifically devised to be borne by residuary estate.*

*Estate duty—Property passing to executors as such—Freehold mortgaged by demise—Trust of reversion for purchaser of term—Nature of purchaser's interest in property—Merger of estates—Statute of Uses (Ireland)*, 1634 (10 *Car.* 1 *sess.* 2, *c.* 1), *ss.* 1, 7—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9.

Premises held under a fee farm grant were mortgaged by way of a demise for 10,000 years to a Bank to secure advances, the mortgagors covenanting to stand seised of the reversion immediately expectant on the term "in trust for any purchaser or purchasers of the premises or to convey and dispose thereof as the Bank or any such purchaser or purchasers may at any time direct". The Bank in exercise of its statutory power of sale sold the premises to S. and thereupon assigned to him the unexpired portion of the term. Neither the Bank nor S. gave any directions to the mortgagors regarding the reversion. S. died and by his will he devised and bequeathed the premises to three persons for life and thereafter to

(1) In the Chancery Division before Lord MacDermott L.C.J.: Dec. 1, 1952; Feb. 12, 13, Mar. 10, 1953.

In the Court of Appeal before Porter and Black L.JJ. and Curran J.: June 29, 30, July 1, Dec. 23, 1953.

named charities, made a number of specific and pecuniary bequests some of which were expressed to be given "free of legacy duty", and left his residuary estate consisting of realty and personalty to his executors on trust, inter alia, to pay his debts funeral and testamentary expenses and death duties.

*Held*, that even if S's. interest in the premises were real property the direction to pay death duties out of the residuary estate exonerated the specific devises from the payment of estate duty in respect of the premises.

A direction to pay death duties out of residuary estate may extend to cover estate duty on specific devises notwithstanding that the testator has by discriminating between some legacies and others indicated that the direction is not intended to cover legacy duty.

*Quaere*, whether S.'s interest in the premises was real property or personal property.

Per Porter L.J. The mortgagors' covenant to stand seised of the reversion was not executed by the Statute of Uses since it was an active trust requiring the trustees to convey and dispose as directed. S.'s interest in the term was a legal interest and did not merge in his equitable estate in the reversion, and the premises must accordingly be treated as personalty for estate duty purposes. Per Black L.J. On the true construction of the mortgage deed the mortgagors retained the legal estate in the freehold reversion and S. as purchaser was entitled only to the equitable estate in the reversion. There was no merger of S.'s legal estate in the term and his equitable estate in the reversion, but as the beneficial estate in the term and the beneficial estate in the reversion had become vested in one person the term should be regarded as attendant on the inheritance, and accordingly S.'s interest should be regarded as realty for estate duty purposes. Even if the mortgagor's covenant to stand seised were to be regarded as being executed by the Statute of Uses it would, having been made for a money consideration, be treated as a bargain and sale which would require enrolment as prescribed by the Statute to make it effective as a conveyance of the legal estate.

Decision of Lord MacDermott L.C.J reversed.

ORIGINATING SUMMONS.

Bennett Sergie, who died on April 17, 1947, by his will dated July 10, 1942, devised and bequeathed the premises known as Bennett Buildings, Donegall Street, Belfast, to his sisters Rosie Grossman and Rachel Levine and his friend Elizabeth Hall and the survivor and survivors of them for life and upon the death of the survivor he devised and bequeathed the premises to the Royal Victoria Hospital, Belfast, the Mater Infirmorum Hospital, Belfast, and the Leeds Jewish Hospital, Leeds, in equal shares subject to the payment

of £1000, namely £500 each to the Belfast Hebrew Schools and the Belfast Hebrew Board of Guardians. The will also contained several specific and pecuniary legacies, some of which were expressed to be given free of legacy duty and others which were not expressed to be so given. The testator devised and bequeathed his residuary estate, which comprised substantial real and personal property, to his executors upon trust for sale and conversion and out of the proceeds to pay " debts " funeral and testamentary expenses and death duties " and to hold the remainder upon trust for his four sisters absolutely.

The plaintiffs, the executors of the will, acting on the assumption that the testator's interest in Bennett Buildings was a freehold interest took out this originating summons to determine whether on the true construction of the will the estate duty payable in respect of Bennett Buildings ought to be borne by the specific devisees or by the residuary estate. On the summons coming on for hearing this assumption was challenged, and the matter was adjourned to enable the summons to be amended so as to raise the question of the nature of the testator's interest in the premises.

The facts relevant to this latter question were as follows :

By an indenture of fee farm grant dated January 28, 1916, certain premises in Donegall Street, Belfast, were granted by the Earl of Shaftesbury to Charles Nicol Leitch and Frederick Johnston Leitch, their heirs and assigns, for ever, as tenants in common, subject to a yearly fee farm rent of £125 and to the covenants and conditions contained in the grant. By an indenture of mortgage dated October 12, 1927, Frederick Johnston Leitch and Charles Nicol Leitch demised the premises comprised in the fee farm grant to the Belfast Banking Company Limited for a term of 10,000 years by way of mortgage to secure the repayment of the sums therein mentioned. This mortgage provided that all the powers conferred upon mortgagees by the Conveyancing Act, 1881, should apply to the security, and it was expressly covenanted between the parties that the mortgagors should stand seised of the reversion

immediately expectant on the term of 10,000 years "in trust for any purchaser or purchasers of the "premises or to convey and dispose thereof as the "Bank or any such purchaser or purchasers may at "any time direct".

In 1927 the Bank went into possession under the mortgage, and in March 1930 in exercise of its statutory power of sale sold the premises to the testator and by indenture dated March 18, 1930, assigned to the testator the premises "to hold the same unto the said "Bennett Sergie his executors administrators and "assigns henceforth for all the residue now unexpired "of the said term of 10,000 years granted by the said "indenture of mortgage subject henceforth to the "payment of the rent and performance and observance "of the covenants on the part of the grantee and conditions by and in the said recited indenture of fee "farm grant reserved and contained but freed and "discharged from all right of redemption and from all "claims whatsoever under the said indenture of mortgage." Later the testator demolished the buildings on the site and erected new buildings which were known as Bennett Buildings. Though the testator paid the fee farm rent from 1930 until his death neither he nor the Bank at any time gave any directions to the mortgagors regarding the outstanding reversion.

The questions which the court was asked to determine on the summons as amended were :

(1) Whether . . . the sum of £8954 : 14 : 10, being the amount of estate duty and interest thereon payable in respect of the premises known as Bennett Buildings . . . falls to be paid :

(*a*) out of the residue of the estate of the testator ; or

(*b*) out of the property known as Bennett Buildings ; or

(*c*) whether the interest of the testator as assignee of a term of 10,000 years under an assignment dated March 18, 1930, passed to the executors as such within the meaning of section 9 of the Finance

Act, 1894, and the interest of the testator in the reversion of the said term of 10,000 years under the said assignment did not pass to the executors as such within the meaning of section 9 of the Finance Act, 1894?

(2) If the answer to 1 (*c*) be yes, what part of the said sum of £8954 : 14 : 10 is charged on the said premises?

*Nicholson Q.C.*, *Topping Q.C.* and *Fox* for the executors.

*McCoy Q.C.* and *Petrie* for Elizabeth Hall, and *Stewart Q.C.* and *Appleton* for Rosie Grossman and Rachel Levine, the devisees for life of Bennett Buildings.

*Patton Q.C.* for the Management Committees of the Royal Victoria Hospital and of the Leeds Jewish Hospital, and *McSparran* for the Mater Infirmorum Hospital, the devisees in remainder of Bennett Buildings.

*McSparran Q.C.* and *MacDermott* for Ettie Goldie, one of the residuary legatees.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J. stated the facts and continued:

The point arises whether at the time of his death the testator owned Bennett Buildings in fee, that is for the interest of the grantees under the said fee farm grant, or whether his interest was that of a leaseholder, as assignee of the term of 10,000 years, with, in addition, a distinct equitable interest in the freehold reversion by virtue of the mortgagors' said declaration of trust.

This raises a question of merger. While this word is sometimes used to signify the absorption or extinguishment of an equitable interest in a commensurate and co-extensive legal interest, it is still, I think, the rule that strict merger as between different estates or interests only occurs when both are legal or both are equitable: see Mayhew on Merger (1861), p. 7. Ac-

cordingly, I do not see how, in this case, the term of years could have merged in an equitable estate in the freehold reversion, if that was the interest which Mr. Sergie became entitled to under the declaration of trust. It seems to me, however, that there was nothing to prevent section 1 of the Irish Statute of Uses operating upon this declaration so as to vest in Mr. Sergie, when he purchased, a legal estate commensurate with the use or trust declared in his favour. What, then, was the extent of the trust declared by the mortgagors? They say that they shall stand seised of the reversion expectant on the said term for the purchaser, and I have no doubt at all, reading the instrument as a whole and having regard to the nature of the transaction it was intended to effectuate, that the intention was that the trust should apply to the entire interest of the grantees under the fee farm grant and that the purchaser should have nothing less. But Mr. Patton contended that the declaration of trust referred to the purchaser without any words of limitation the trust for the purchaser was limited to a life estate so that, if the Statute of Uses applied, Mr. Sergie had nothing more, in addition to the term, than a legal life estate in the fee; and as that, the argument proceeded, would not have meant a merger in equity it could not, having regard to section 28 (4) of the Judicature Act (Ireland), 1877, mean a merger in law.

If this argument is well founded it takes those to whom Bennett Buildings has been given a considerable distance, as in that event all Mr. Sergie was competent to dispose of by will was the term of years. The point seems to turn on whether the absence from the declaration of trust of the technical words appropriate to the creation of an estate in fee deprived the purchaser of more than an interest for life in the freehold reversion. Whether the use of the words of inheritance, or their statutory equivalent, is necessary in creating equitable interests in fee has been considered in many cases, both before and since Chatterton V.-C. decided *Meyler v. Meyler* (1). The decisions are not all consistent, some

(1) (1883) 11 L.R. Ir. 522.

judges being obviously anxious to make equity follow the law more closely than others. In my opinion, the applicable proposition of law is that stated in Lewin on Trusts, 12th ed., p. 124, and approved by Eve J. in *In re Bostock's Settlement* (1). It is in these terms: "In creating a trust, a person need only make his "meaning clear as to the interest he intends to give, "without regarding the technical terms of the common "law in the limitation of legal estates. An equitable "fee may be created without the word 'heirs,' and an "equitable entail without the words 'heirs of the "'body,' provided words be used which, though not "technical, are yet popularly equivalent, or the "intention otherwise sufficiently appears upon the "face of the instrument." The decision of Eve J. in *Bostock's* case was affirmed by the Court of Appeal (2), but on different grounds. Eve J. thought the settlement in question did not evince a sufficient intention that the beneficiaries concerned should take absolute interests. The Court of Appeal appears to have been satisfied that the settlement did show such an intention, but it considered that, in the circumstances of the case, the appropriate rule of law was not that stated in the passage I have quoted from Lewin, but that stated in a subsequent paragraph by the same learned author. This will be found at p. 125 of the 12th edition. It reads thus: "But though technical terms be not "absolutely necessary, yet where technical terms are "employed they shall be taken in their legal and "technical sense. Lord Hardwicke indeed once added "the qualification, 'unless the intention of the testator "'or author of the trust plainly appeared to the "'contrary.' But this position has since been repeat-"edly and expressly overruled, and at the present day "it must be considered a clear and settled canon "that a limitation in a trust, perfected and declared "by the settlor, must have the same construction as "in the case of a legal estate executed."

As already indicated, I think the rule applied by

(1) [1921] 1 Ch. 432, 436. (2) [1921] 2 Ch. 469.

the Court of Appeal in *Bostock's* case (1) is not the appropriate rule here. In my opinion the clear intention of the instrument is what must prevail here, a conclusion which, to my mind, is amply supported by the decision of O'Connor M.R. in *In re Fayle and the Irish Feather Company's Contract* (2).

On this view of the law, and having regard to the opinion which I have already expressed as to the true intention of the mortgage deed, I hold that the use or trust enjoyed by the purchaser under the declaration of trust was not limited to a life interest, but was co-extensive with the estate of the fee farm grantees, and accordingly that the Statute of Uses vested in Mr. Sergie, as purchaser, a legal interest in the freehold reversion.

If I am right in this, I think it must follow that the term of years merged in the freehold reversion and that Mr. Sergie at the time of his death had but one estate, a freehold estate, in Bennett Buildings. While I regard the payment of the fee farm rent as in itself equivocal in the circumstances I can see nothing to suggest an intention to keep the two interests from merging. On the contrary, I think everything favours the view that for Mr. Sergie as purchaser merger would have been convenient and desirable.

I turn, therefore, to the question as originally submitted, on the basis that Bennett Buildings was realty and nothing else in the hands of the testator.

If the devise of Bennett Buildings stood alone and had not to be considered in relation to the testator's other dispositions the estate duty in question would have to be borne by the devised hereditaments and the executors would be entitled to repayment of the duty paid and a charge in respect thereof. This is clear law and was, indeed, conceded by all concerned. But it was contended that the testator had effectually exonerated Bennett Buildings from this burden by the terms of his residuary disposition. By this he gave the residue of his estate to the plaintiffs upon trust for conversion and directed them out of his ready money

(1) [1921] 2 Ch. 469. (2) [1918] 1 Ir. R. 13.

and the proceeds of conversion, " to pay my debts " funeral and testamentary expenses and death duties " and all legacies under this my will or any codicil hereto " in case I shall not leave sufficient ready cash to pay " same ". The submission here was that this direction to pay " my . . . death duties " included the duties attaching to the several dispositions made by the will. Against this, it was urged that the direction referred only to the duties which by law fell to be satisfied out of residue and therefore excluded those which, prima facie, had to be borne by legacies and devises.

*In re Pimm*, (1) favours the former and wider of these possible interpretations. There, the testator, after making certain pecuniary bequests and devising certain freeholds upon trust by way of settlement, left the residue of his real and personal estate to his trustees upon trust for sale and conversion and directed that, after payment out of the proceeds " of my debts, " funeral and testamentary expenses and duties, and " the incumbrances which may be charged on my said " estate or any part thereof ", the clear residue should be held upon trust for certain persons. Farwell J. decided that on the proper construction of this direction, the settlement estate duty and the estate duty payable in respect of the specifically devised realty must be paid out of the general residuary estate in exoneration of that realty. In the course of his judgment he said : " The expression ' my duties ' is certainly a wide phrase, " and I can see no ground for restricting its generality. " I think it is a compendious way of expressing what " he [the testator] had in his mind, and that he meant to " say, ' all duties to which my estate is liable by reason " of any of the dispositions I have made in my will '. " I can see no other sensible construction of this " direction in the residuary clause of the will. The " duties are payable to the revenue, but they arise " under the provisions of the testator's will, and in this " sense are the testator's duties." (2) In *In re Cayley* (3), a testatrix directed that " the death duties

(1) [1904] 2 Ch. 345.
(2) Ibid. 347.
(3) [1904] 2 Ch. 781.

" payable out of my estate " should be paid out of a specific fund and it was held that this made the settlement estate duty on certain chattels settled by the will payable out of that specific fund and not out of the settled property which, in the absence of express provision to the contrary, would have been primarily liable under section 19 (1) of the Finance Act, 1896. In his judgment, Swinfen Eady J. cited the decision in *In re Pimm* (1) with approval and came to the conclusion that the expression " the death duties payable " out of my estate " extended to all death duties. " It is ", he said, " a convenient and compendious " expression, and I can see no reason to restrict its " meaning " (2).

Now, if the matter ended here and one had not to look beyond the devise and the residuary directions of the present testator I would, on the strength of these decisions, be inclined to accept the view that the instruction to pay " my . . . eath duties " exonerated the devise of Bennett Buildings. The will, however, contains other relevant provisions. As amended by the codicil, it bequeaths a series of pecuniary and specific legacies of which some are given " free of legacy duty " and some are given without any reference to legacy duty. This discrimination, it was contended, showed that the testator meant those whose legacies were not expressed to be given free of duty to bear that duty themselves and, that being so, the direction to pay " my . . . death duties " could not, the argument proceeded, be construed as exonerating the testator's several dispositions, concerning which there was no express provision to the contrary, from the duties which the law placed upon them. It seems to me there is much force in the logic of this argument and that it is only possible to ignore it if one is prepared to hold that the words " free of legacy duty," which the testator used in respect of some, but not all, of the dispositions to which they would have been appropriate, are completely redundant. In saying that I do not overlook Mr. Patton's submission, founded on

(1) [1904] 2 Ch. 345. (2) [1904] 2 Ch. 784.

the distinction between legacy duty and estate duty, to the effect that the words " my . . . death duties " would still suffice to include estate duty payable in respect of devised realty, even if held not to include legacy duty. This is an ingenious point, but the distinction on which it rests seems to me too fine and subtle to afford any reliable indication of the testator's intention.

The effect of an apparently discriminating use of words such as " free of legacy duty " has been considered in several English decisions, to which I must now refer. In *In re Massey*, (1), the direction of a testatrix to her executors to pay " testamentary " expenses including death duties " was held not to entitle her legatees to have the duty on their respective interests discharged out of the residuary estate. The testatrix had begun by bequeathing certain legacies to each of her executors " free of legacy duty " and had subsequently bequeathed other pecuniary legacies payable after the death of her husband ; and Eve J., in the course of his judgment and after reaching a decision on the language and terms of the will, proceeds to say this ; " Moreover, if it " —that is the direction to pay death duties—" really extends so as to " include duties on legacies immediately payable, the " directions at the commencement of the will that the " legacies given to two of the executors are to be paid " free of legacy duty are quite superfluous." Then, in *In re Borough*, (2), a testator, having given a number of legacies free of duty and other legacies which were not expressly stated to be free of duty, gave his residuary estate upon trust for sale and conversion and to pay out of the proceeds " my funeral and testa- " mentary expenses and all death duties (payable in " consequence of my death) and my debts and also to " pay or provide for the legacies and annuities . . . ." Simonds J. (as he then was) held that the direction to pay " all death duties (payable in consequence of " my death) " did not suffice to make the legacy duty on the legacies not given free of duty payable out of the

(1) (1921) 90 L.J. Ch. 40. (2) [1938] 1 All E.R. 375.

residue. In the course of his judgment he remarked on the discrimination shown by the testator in giving some of the legacies free of duty and others not so free and added (1) : " It must require, in my view, a very " strong indication in some other part of the will if it " is to be determined that all the legacies are to be " free of duty." *In re King* (2), was a decision of the Court of Appeal. There, a testator devised and bequeathed a number of specific devises and bequests, some of which were expressed to be free of duty and some of which were not, and subsequently directed his executors to pay out of his residuary estate " all duties payable in respect of my estate." The court held that this direction did not relieve the gifts which had not been expressly given free of duty from the burden of bearing their own duties. In giving the judgment of the court Luxmoore L. J. said (3) : " In our opinion the question in the present " case is : Ought the words ' all duties payable in " respect of my estate,' to be construed without " regard to the fact that certain dispositions in the " testator's will are in express terms given free of duty " while other dispositions in the will and the first " codicil are not expressed to be so given, or ought " the words referred to to be construed having regard " to that fact ? If the former method of construction " is correct, then every disposition taking effect at the " testator's death would be freed from liability for " duty although the testator had apparently . . . " treated some of his testamentary dispositions " differently from others in respect of freedom from " duty. In our view, the latter method of construction " appears to be the safer, for it gives effect to the " express directions of the testator and avoids treating " the expressions with regard to the freedom of par- " ticular benefits from duty as being tautologous." And finally, there is *In re Palmer* (4). In that case a testator, having given several pecuniary legacies free of duty and one specific legacy not free of duty, gave

(1) [1938] 1 All E.R. 375, 377.
(2) [1942] Ch. 413.
(3) Ibid. 420.
(4) [1946] Ch. 49.

his residue upon trust for conversion and directed that his trustees should, out of the proceeds and his ready money, " pay my funeral and testamentary expenses " death duties and debts . . ." He then divided the net residue into three shares, each of which he settled upon certain trusts, the nature of which caused the legacy duty payable on the different shares to vary between one per cent. and ten per cent. Uthwatt J. held that the division of the residue must be made without making any deduction in respect of legacy and succession duty, each share being left to bear its own duty. One of the considerations leading the learned judge to this conclusion was undoubtedly the fact that the testator had discriminated amongst his legatees as to freedom from duty, for he says, in the course of his judgment (1); " When one " looks at the will, one has this fact to start with, " that there are legacies given free of duty, and there is " a legacy which is not expressed to be given free of " duty. One has this further fact, that there is no " express direction as regards the freedom from legacy " duty of the various shares in residue. The provision " relating to ' death duties ' occurs in a direction to the " trustees as to the course which administration should " pursue, and is not in substance directed to creating " beneficial interests."

These authorities lead me to the conclusion that I should have regard to the testator's use of the words " free of legacy duty " and that they ought not to be left out of account as redundant. That being so, I am of opinion that on the true construction of this will the estate duty payable in respect of Bennett Buildings falls to be borne by that property and not by the residuary estate. I therefore answer question 1 (*a*) in the summons as amended " No," question 1 (*b*) " Yes " and question 1 (*c*) " Does not arise."

I may add that I am by no means certain that this decision represents what the testator had actually in mind. Testators as a class are not always logical and precise in the expression of their wishes; but the

(1) [1946] Ch. 52.

court has to work on what they have said, and here I see no real alternative to the conclusion I have reached on the construction of this will which does not involve a process of pure speculation.

Question 3 of the summons as amended raises a subsidiary issue as to the amount of interest payable to the executors in respect of the sum paid by them in defraying the estate duty referable to Bennett Buildings. I have been given to understand, since I started to prepare this judgment, that the parties have now settled this question by agreement. It was clearly within their competence to do so, and I therefore express no opinion on the matter save to direct that question 3 be answered: "Does not arise owing to agreement between the parties."

The Hospital Management Committees appealed to the Court of Appeal.

*Patton Q.C.* and *Petrie* for the appellants.

*Nicholson Q.C.* and *Fox* for the executors.

*McSparran Q.C.*, *Harrison Q.C.* and *MacDermott* for the respondent Ettie Goldie.

*Cur. adv. vult.*

PORTER L. J. stated the facts and continued:

The main question for determination is whether the estate duty and the interest thereon in respect of Bennett Buildings falls to be borne by Bennett Buildings or by the residuary estate, and a great part of the argument in this court turned on the question whether the testator was or was not the legal owner of a fee simple estate in the property.

The Lord Chief Justice held that in addition to the term the testator took an equitable estate in the freehold reversion by virtue of the mortgagors' declaration of trust, that notwithstanding the absence of words of limitation in the declaration of trust he took an estate in fee simple in the reversion, and that the Irish Statute of Uses operated on the declaration so as to vest in the testator a legal estate commensurate with the trust declared in his favour, the result being that

the doctrine of merger applied and the testator therefore took a legal estate in fee simple in the property.

Estate duty payable in respect of real property is a charge upon the real property, and if the executors have paid it they are entitled to recover it from the devisee of the property upon which it is charged. Notwithstanding this charge, the Lord Chief Justice was inclined to accept the view that the instruction to pay "my . . . death duties" would exonerate the devise of Bennett Buildings from estate duty, if the testator had not given several of the legacies "free of legacy duty." But since the testator, by the use of these exonerating words, had shewn that he was discriminating between the various dispositions, the Lord Chief Justice held that the direction to pay "my . . . death duties" could not be construed so as to exonerate the real property from the duties which the law placed upon it.

I propose to discuss this matter first of all on the assumption that the testator was the legal owner of a fee simple estate in Bennett Buildings. Where some legacies are expressed to be free of legacy duty, the natural inference is that the other legacies which are bequeathed simpliciter without any such words must bear their own legacy duty, but it does not follow that a devise of real property must therefore bear its own share of *estate* duty. The estate duty is a charge upon it, irrespective of whether some or all of the legacies are expressed to be free of *legacy* duty, and the real question here is whether the direction to pay "my . . . death duties" relieves the real property of the burden of estate duty which the law imposes upon it.

Testamentary expenses include the estate duty payable in respect of the free personal estate, so that death duties, if they are to bear their ordinary meaning in this connection, comprise (*a*) estate duty upon the real estate, (*b*) legacy duty and (*c*) succession duty. It may well be that the prior bequests of several legacies free of legacy duty restrict this wider meaning, and that the testator did not intend to include legacy duty and succession duty under "my . . . death duties."

But even if this was his intention it does not follow that he intended to exclude real estate duty from the death duties which he directed his trustees to pay.

If he had intended that all the devises and bequests, except such as were given free of legacy duty, were to bear their own respective duties it is impossible to attribute any meaning whatever to the direction to pay "my . . . death duties."

The Lord Chief Justice has referred to two cases which, in my opinion, govern the present case. In *In re Pimm* (1) the testator directed that out of the proceeds of the sale and conversion of his real and personal property his trustees should pay his debts, funeral and testamentary expenses and duties. It was contended that duties must be restricted to such duties as were properly payable out of the residue—that is to say—the estate duty payable on the free personal estate. Farwell J. rejected this contention and decided that the settlement estate duty, as well as the estate duty payable on the specifically devised realty, was payable by the trustees. He said (2): "The expression 'my duties' is certainly a wide "phrase, and I can see no ground for restricting its "generality. I think it is a compendious way of "expressing what he had in his mind, and that he "meant to say, 'all duties to which my estate is liable "by reason of any of the dispositions I have made in "my will.' I can see no other sensible construction of "this direction in the residuary clause of the will."

This decision was followed by Swinfen Eady J. in *In re Cayley* (3). A testatrix, after bequeathing certain pecuniary legacies "free of all death duties," bequeathed certain chattels upon trust for certain persons for life with remainders over. She directed the trustees out of a specific fund which she bequeathed to them on trust to pay "my funeral and testamentary expenses "and debts and the legacies bequeathed by this my will "and the death duties payable out of my estate." The question was whether the settlement estate duty

(1) [1904] 2 Ch. 345.
(2) Ibid. 347.
(3) [1904] 2 Ch. 781.

was payable out of the settled chattels or out of the specific fund. Settlement estate duty was not a testamentary expense—*In re King* (1) ; *In re Clemow* (2) — and was therefore a burden upon the settled property unless the direction to pay the death duties amounted to an express provision to the contrary within section 19 (1) of the Finance Act, 1896. Swinfen Eady J., after referring to the decision of Farwell J. in *In re Pimm*, said (3) : " The expression ' the death duties " payable out of my estate ' extends to all death " duties, namely settlement estate duty as well as " estate duty. It is a convenient and compendious " expression, and I can see no reason to restrict its " meaning. The duties must, therefore, be borne by " the specific fund."

This decision appears to rule the present case, for the settlement estate duty (which was abolished in 1914) was a charge upon the settled property just as the estate duty payable in respect of realty is a charge upon the realty. Yet the direction to pay the death duties out of the specific fund was sufficient to exonerate the settled property from the settlement estate duty as well as estate duty.

The meaning of death duties was discussed in *In re Massey* (4). A testatrix by a will and codicil both made in the year 1896 gave two of her executors legacies free of legacy duty and she also gave other legacies and annuities, and devised lands to her husband for life with remainder over. She then directed the residue of her personal estate subject to several annuities after payment of " all and singular " my debts funeral and testamentary expenses in- " cluding death duties and payment of all legacies " directed to be paid immediately " to be invested and the income to be paid to her husband for his life, and gave several pecuniary legacies to be payable at her husband's death and the residuary trust fund to the defendants.

(1) [1904] 1 Ch. 363.
(2) [1900] 2 Ch. 182.
(3) [1904] 2 Ch. at 784.
(4) (1920) 122 L.T. 676 ; 90 L.J. Ch. 40.

Eve J. said " that at the time when this will was made " and for many years afterwards the true construction " to be given to the phrase ' testamentary expenses ' " was uncertain. Whether it extended to cover estate " duty payable on personalty was a matter of doubt, and " that doubt was not resolved until the decisions of " Kekewich J. in the case of *Re Lewis : Lewis v. " Smith* (1) : and *Re Clemow* (2). There was there- " fore at the date of the will a reason why a testator " who intended that the estate duty on the personalty " should be paid out of the residue should expressly " so state and I think the direction given by this " testatrix amounts to this and nothing more ' I " desire my testamentary expenses to be paid by " my executors : if the words ' testamentary expenses ' " include the death duties payable by my executors " that is enough, but if they do not I wish to make " it clear that I intend those death duties to be paid " as though they were included in the expression . . . ' "All that she meant was that the executors were "to pay such duties as were by law payable out of " her estate " (3). He therefore held that the executors were liable to pay only such duties as were by law payable out of her estate, irrespective of the question whether or not they would be included in a simple direction to pay " testamentary ex- " penses." He also said that if the direction was intended to include the duties on the legacies immediately payable the direction at the commencement of the will that the legacies to the executors were to be paid free of legacy duty would be quite superfluous. It is clear that the judgment was based mainly upon the form of the expression " testamentary expenses *including* death duties " and the fact that when the will was made it was uncertain what duties were included in testamentary expenses.

I do not think that this decision is in the slightest

(1) [1900] 2 Ch. 176, 180.
(2) [1900] 2 Ch. 182.
(3) (1920) 122 L.T. 676, 678; (1921) 90 L.J., Ch. 40.

degree inconsistent with *In re Pimm* (1) and *In re Cayley* (2). It was a question of the construction of a peculiar expression in a will made at a time when the law regarding death duties and testamentary expenses was still uncertain.

*In re Borough* (3) was a case in which a testator, having given a large number of legacies, eight being expressed to be free of duty, the others being given simpliciter, gave his residuary estate upon trust for sale and conversion and to pay out of the proceeds " my " funeral and testamentary expenses and all death " duties (payable in consequence of my death) and my " debts and also to pay or provide for the legacies and " annuities &c., &c." Simonds J. (as he then was) held that the only death duty payable on testator's death was the estate duty on the personal estate and that those legacies and annuities which were not expressed to be free of duty must bear their own legacy duty.

It was contended that " all death duties " comprised legacy duty as well as estate duty, but this contention was rejected because the testator had shewn a discrimination between the legacies which were free of legacy duty and those not so free.

This decision dealt only with legacy duty and appears to have no bearing on the present case.

*In re King* (4) was a case in which a testator gave a number of devises and bequests, some of which were expressed to be " free of duty " or " duty free " or " free of all duty " or " free of duties," and others were given simpliciter, and after the usual trust for sale and conversion he directed his executor out of the trust property to pay his funeral and testamentary expenses and debts and the pecuniary legacies and " *all duties* " *payable in respect of my estate* " and invest the clear residue &c., &c.

The Court of Appeal, affirming the decision of Simonds J. (as he then was), held that the general direction to pay " all duties payable in respect of my " estate " did not relieve those devises and bequests

(1) [1904] 2 Ch. 345.
(2) [1904] 2 Ch. 781.
(3) [1938] 1 All E.R. 375.
(4) [1942] Ch. 413.

which were not expressly given free of duty from bearing their own respective duties. Luxmoore L.J., delivering the judgment of the court, said (1): "It is "difficult to read this"—i.e. the general direction to pay all duties—"as being intended to free all the "specific gifts and legacies from liability to duty, "where, as in this case, the testator has expressly "freed some of the gifts from duty, and has not done so "in other cases . . . In our opinion, the question in the "present case is: Ought the words in cl. 9, 'all duties "payable in respect of my estate,' to be construed without regard to the fact that certain dispositions in the "testator's will are in express terms given free of duty "while other dispositions in the will and the first codicil are not expressed to be so given, or ought the "words referred to to be construed having regard to "that fact? If the former method of construction is "correct, then every disposition taking effect at the "testator's death would be free from liability for duty "although the testator has apparently in cl. 7 and in "the first codicil treated some of his testamentary "dispositions differently from others in respect of "freedom from duty. In our view, the latter method "of construction appears to be the safer, for it gives "effect to the express directions of the testator and "avoids treating the expressions with regard to the "freedom of particular benefits from duty as being "tautologous."

The decision in my opinion is open to criticism on several grounds. It attributes no meaning or force to the direction to pay *all* duties, and even if the direction is taken to refer only to (*a*) the duty forming part of the testamentary expenses, and (*b*) the duties on the legacies which were given free of duty, it is quite superfluous because the testator had already directed payment of these two classes of duties. Moreover, the construction adopted by the court runs counter to the well settled rule that where there are two conflicting clauses in a will, the latter must prevail. If one seeks to discover the intention of the testator in these con-

(1) Ibid. 419-20.

flicting clauses I think the natural and probable explanation is that when he came to the clause in which the usual direction is given for the administration of his estate, realizing that he had given some legacies free of duty and others not free, he directed his executors to pay not some duties only but *all duties* payable in respect of his estate, intending this to cover all duties whatsoever or at all events all those duties for the payment of which he had not expressly provided. Even if this direction is considered to be tautological, it is, I think, safer to carry out the express intention of the testator that *all* duties should be paid by the executors rather than to adopt a technical construction which gives no meaning to these words and is based upon an inference which is drawn from the fact that some of the legacies are expressed to be free of duty in the earlier parts of the will. This, in my opinion, is a very doubtful decision and in any event we are not bound to follow it.

*In re Palmer* (1) was a case regarding the incidence of legacy duty on shares of the residuary estate. A testator gave several pecuniary legacies free of duty and one specific legacy not free of duty and gave his real and personal estate upon trust for conversion and out of the proceeds of sale and his ready money to pay his funeral and testamentary expenses, death duties and debts and pay or provide for legacies. The residue was to be divided into three shares, one settled on his wife for life, and afterwards to his son on attaining the age of 25 years, another to his son absolutely and the remaining third for his mother and brother in equal shares. The legacy duty payable on the different shares of the residue varied from 1 per cent. in the case of the son to 10 per cent. in the case of the wife. It was contended on behalf of the residuary legatees that the testator intended to give the shares of the residue free of legacy duty and that the whole of the legacy duty on the residue should be first paid although the rates of duty might differ, and the clear residue divided into three parts and dealt with in accordance with the will.

(1) [1946] Ch. 49.

Uthwatt J. (as he then was) said that the provision as to death duties occurred in a direction to the trustees as to the course which administration should pursue, and was not in substance directed to creating beneficial interests so that it was wholly a matter of machinery and direction to the executors and trustees as to what they were to do. He said he thought he was bound by the decision in *In re King* (1) and that having regard to the place in the will where the direction to pay death duties was found, to the generality of the term, and the circumstance that certain legacies were given free of duty while one was not, the testator did not intend to free the various interests in the residue from liability to legacy duty to which they were subjected by the ordinary law and which they themselves must bear.

The decision, which is concerned only with the incidence of the legacy and succession duties on the shares of the residue, is of no assistance in enabling us to decide whether the estate duty on Bennett Buildings ought to be borne by the property itself or is payable out of the general residuary estate. Uthwatt J. seems to treat the direction to pay "death duties" after the words "funeral and testamentary expenses" as wholly a matter of administrative machinery and direction to the executors and trustees as to what they are to do, but if he meant to convey that such a direction amounts to nothing more than a mere direction to administer the estate, I cannot agree, and in arriving at this conclusion I have followed the same line of reasoning as was adopted by Farwell J. and Swinfen Eady J. in the two cases which I have cited.

So far I have not touched upon a question which formed no inconsiderable part of the discussion in this court, viz. whether the testator was the legal owner of the freehold in Bennett Buildings or merely the owner of the term of 10,000 years with an equitable estate in the freehold reversion. The covenant by the mortgagors to stand seised of the reversion in trust for the purchaser differs in no material respect from the usual

[1942] Ch. 413.

form adopted in cases where the premises are held under a fee farm grant. (See Irish Forms and Precedents, p. 421). The purchaser of the term from the Bank became the equitable owner of the freehold reversion with a right to call upon the mortgagors to convey the legal estate to any person he might name. This is not a simple trust, but one which requires the mortgagors "*to convey and dispose of*" the freehold reversion as the purchaser might direct. It is therefore what is called a special trust which necessitates the legal estate remaining in the trustees until they convey it according to the direction of the purchaser. As Parke B. said in *Barker v. Greenwood* (1) where the trustees have anything to do in the execution of the trusts the legal estate must remain vested in them, and in *Doe d. Shelley v. Edlin* (2) it was said (*per curiam*) that the trustees must take that quantity of interest which the purposes of the trust require. In that case the testatrix devised estates to N. in fee in trust to receive and apply the proceeds to the use of S. for her life and immediately after the death of S. "to "convey the same to such uses as S. should by deed or "will appoint." The court held that the legal estate which was vested in N. did not lapse on the death of S. but vested in N. as an absolute legal fee to be conveyed by him according to the directions given by S.

So also *Doe d. Noble v. Bolton* (3): where a testator devised his manor and mansion house to trustees in trust to permit and suffer his wife, should she wish to do so, to occupy the same and to receive the rents and profits thereof until his son was of age provided she remained unmarried; and on the son attaining 21 then in trust to release, convey and assure the manor and mansion to his son in fee. The court held that the legal estate in the premises vested in the wife till her son attained the age of 21 and Lord Denman C. J.,

(1) (1838) 4 M. & W. 421.
(2) (1836) 4 Ad. & El. 582.
(3) (1839) 11 Ad. & El. 188.

delivering the judgment of the court said : " It is plain " that the trustees must take the legal estate after the " death of Mrs. Noble, in order to convey the same to " her son." The Statute of Uses has no application to a trust of this kind where the trustees have a duty to perform. The Chief Justice holding that the Statute of Uses applied to the trust contained in the covenant to stand seised decided that the purchaser on completing the purchase became clothed with the legal estate in the freehold reversion. According to this view the trust to convey and dispose of the freehold reversion is superfluous and meaningless. In my opinion these words clearly show that the real object of the covenant is to give the purchaser the option of calling for the legal estate in the freehold if he desired to have it. The Bank did not want it and it might well be that the purchaser would prefer not to acquire it if he considered that the rent reserved and the covenants contained in the fee farm grant were too onerous. According to the construction adopted by the Chief Justice the purchaser of the term had no such option, but was obliged to assume the legal estate and thus to undertake direct liability for the rent and the covenants in the fee farm grant. In my opinion such a view would nullify what I conceive to be the real object of this covenant which has been in common use by conveyancers for very many years. I hold, therefore, that the legal estate in the freehold is still outstanding in the trustees or their representatives. The leasehold term, being a legal term, did not merge in the equitable estate of the testator in the reversion, and Bennett Buildings must, therefore, be treated as personal property. The estate duty on these premises, as on the other personal estate of the testator, falls to be paid out of the general residuary estate as part of the testamentary expenses.

In the event it seems to me to be immaterial, so far as estate duty is concerned, whether the property is treated as freehold or leasehold.

The appeal must, therefore, be allowed.

BLACK L.J. stated the facts and continued :

The question at issue in this appeal is whether the estate duty payable in respect of Bennett Buildings falls to be borne by and is payable out of the property itself, or whether on the other hand it is payable out of the testator's residuary estate.

The arguments addressed to the court fell under two separate heads. In the first place the appellants contended that the interest in Bennett Buildings to which Bennett Sergie was entitled at the date of his death was an interest which passed to his executors as such, so that the estate duty in respect of the premises was payable out of his residuary estate, while the respondents contended that his interest was an estate of freehold, so that the estate duty was a charge upon and payable out of the property itself by virtue of the provisions of section 9 (1) of the Finance Act, 1894. And in the second place it was contended by the appellants and denied by the respondents that even if the testator's interest in the property was a freehold interest yet the terms of his will were such as to throw the estate duty, leviable in respect of the property, upon his residuary estate in relief of the specific devisees. It will be convenient to consider these two topics separately.

First then, what was the nature of the interest to which the testator was entitled in the property ? The arguments in regard to this centred round the covenant in the mortgage that the mortgagors should stand seised of the reversion expectant upon the term of 10,000 years in trust for any purchaser or purchasers of the premises, or to convey or dispose thereof as the bank or any such purchaser or purchasers might at any time direct. This follows the old form of trust of the nominal reversion after the exercise of the mortgagee's power of sale which used formerly to be inserted in a mortgage by subdemise : (see Davidson, Conveyancing Precedents, 2nd ed. (1858), Vol. II, Part 2, p. 822). The modern practice, of course, is that the mortgagor should simply declare that he will stand possessed of the reversion in trust for the mortgagee, and to dispose thereof as he shall direct. As this does not vest the

legal but only an equitable estate in the mortgagee it does not render him personally liable to the lessor or grantor for the rent and covenants of the lease or grant : *Walters v. Northern Coal Mining Co.* (1). The older form, however, as pointed out in the argument, is retained in the precedent in the Irish Forms and Precedents (at p. 421) of a mortgage by demise of lands held in fee farm. The object of the form is obviously to confer a right to the reversion upon a purchaser of the lands from the mortgagee while avoiding any vesting in the mortgagee of the reversion lest it might subject him to personal liability for the rents and covenants of the grant under which the lands are held.

The Lord Chief Justice, from whose decision the present appeal is taken, held that the effect of the covenant in the mortgage was automatically to vest a legal estate in the reversion by virtue of the operation of the Statute of Uses in a purchaser from the Bank under their power of sale. And as the legal estate in the 10,000 year term was undoubtedly conveyed to Bennett Sergie by the indenture of March 18, 1930, the Lord Chief Justice had no difficulty in holding that this term must be taken to have merged in the inheritance, so that Bennett Sergie was simply entitled at the date of his death to the grantee's interest under the fee farm grant, an interest which would not, of course, pass to his executors as such.

The appellants, who were concerned to contend that the estate duty on the property was payable not out of the property itself but out of the testator's residuary estate, opposed this conclusion with a variety of arguments. In the first place they submitted that the only interest in the property which ever became vested in Bennett Sergie was the leasehold interest actually conveyed to him by his purchase deed, and that he was not entitled to claim any further interest by relying on the covenant in the mortgage. I cannot accept this view. If the provision in the mortgage regarding the reversion is not invalid by reason of any rule of law, I see no reason why a purchaser from the

(1) (1855) 5 De G. M. & G. 629.

bank should not be entitled to the benefit of it. Quite apart from the provisions of the Real Property Act, 1845, it appears to have always been recognised that a person could take an estate in remainder or an estate by way of use or trust under an indenture inter partes although he was not a party to the deed. It was, however, contended by the appellants that the provision that the mortgagors should stand seised of the reversion in trust for a purchaser was invalid as transgressing the rule against perpetuities. I am unable also to accept this contention. The provision in question in conjunction with the demise to the mortgagee of a long term of years is only a device for creating a satisfactory security over the premises, and for enabling a purchaser from the mortgagee to obtain a right to the whole of the mortgagor's interest in the property which was intended to constitute the security for the loan ; in other words the provision is merely ancillary to the mortgagee's power to realise his security by a sale of the mortgaged premises, and is designed to enable that power of sale to be carried out effectively. In *Knightsbridge Estates Trust Ltd. v. Byrne* (1) it is laid down in broad terms that the rule against perpetuities does not apply to mortgages. Certainly it seems always to have been assumed that the rule does not apply to the mortgagee's power of sale or his other powers for enforcing his security. If this is so it could hardly be held to apply to a power which is merely ancillary to the power of sale, and the only object of which is to enable the mortgagee to realise his security effectively and to confer a satisfactory title upon the purchaser. Until the latter half of the nineteenth century the form of mortgage of leaseholds by subdemise to be found in the standard collections of precedents normally contained a provision regarding the nominal reversion which was to all intents similar to that contained in the mortgage in the present case : (see the observations in Davidson, 4th ed. (1881) Vol. II, Part 2, p. 119). So far as I am

(1) [1938] Ch. 741 ; [1939] Ch. 441.

aware it was never suggested that such a provision might transgress the rule against perpetuities.

So far then as the provision in the mortgage relating to the nominal reversion is concerned, the main questions to be considered are in regard to the nature and the extent of the interest in the reversion which will be taken by a purchaser from the mortgagee. Is it a legal interest or an equitable interest? Is it a life interest or an absolute interest? This is a pure question of construction. Reading the relevant portion of the mortgage it seems to me quite clear that the parties contemplated that after the exercise by the bank of their power of sale the legal interest in the reversion would still be found to be vested in the mortgagors, and that the purchaser would only have an equitable right to call for a conveyance of this reversion, but that this equitable right would be to call for a conveyance of the whole of the mortgagors' interest in the reversion, and not merely an interest limited to the duration of the purchaser's life. How could the mortgagors, after a sale by the Bank, perform their obligation to convey and dispose of the reversion as the Bank or a purchaser should direct unless they still had some estate or interest in the reversion? And as the obligation to convey and dispose of the reversion as the Bank or a purchaser should direct is executory in its nature, and as the obvious intention is that the Bank or a purchaser should be entitled to call upon the mortgagors to convey the whole of their interest in the reversion, this intention can be given effect to without any words of limitation being required, the trust being an executory one. In such circumstances it would be odd to a degree if the alternative trust in favour of a purchaser himself should (as was seriously argued by the appellants) be construed as giving the purchaser only a life interest in the reversion. It is to be remembered that we have not here to construe a settlement but a document executed for a money consideration. In my opinion a court of equity should not be slow to construe it so as to carry out the obvious intention of the parties, and for my part I would be prepared to hold

that on the true construction of the document the effect of the clause under discussion was that after a sale by the Bank the mortgagors would still retain the legal estate in the freehold reversion, but that they would hold it in trust for the purchaser so that he would become entitled absolutely to the equitable estate in that reversion.

The Lord Chief Justice, however, took a different view. He held that there was nothing to prevent section 1 of the Irish Statute of Uses, 1634, operating upon the declaration that the mortgagors would stand seised of the reversion in trust for the purchaser, and accordingly he came to the conclusion that by virtue of the Statute of Uses the legal and not merely an equitable estate in the reversion became vested in the purchaser. This view however, if I may respectfully say so, appears to me to be beset with difficulties. In the first place, what becomes of the words "or to convey or dispose thereof as any such purchaser or purchasers may at any time direct"? Are these words to be treated as in effect adding nothing to the declaration that the mortgagors will stand seised of the reversion in trust for any purchaser or purchasers, and may they accordingly simply be disregarded? Or are they to be disregarded on the principle that if there are two conflicting provisions in a deed the earlier one is to prevail? But even if it is legitimate to accept the view that we must focus our attention solely upon the declaration that the mortgagors shall stand seised of the reversion in trust for any purchaser or purchasers of the premises, and must therefore disregard the following words, grave difficulties still appear to me to remain. No doubt the Statute of Uses executes trusts and confidences as well as uses. But if we are to apply the Statute of Uses in the present instance it is necessary to be clear as to the nature of the transaction and as to the operation of the statute upon it. The mortgagors do not purport to convey the reversion at all; they merely covenant that they will stand seised of it in trust for the purchaser or purchasers. The declaration of the use in favour of the purchaser or

purchasers is accordingly one (to use the old phrase) operating without transmutation of possession. In cases of this type where the seisin was unchanged no use could be created without consideration: (Norton on Deeds, 2nd ed. p. 224). The consideration might take the form either of money or money's worth or of blood or marriage. In the latter case the declaration of the use was termed simply a covenant to stand seised, but where the consideration was money or money's worth it was styled a bargain and sale. In the present case the consideration for the declaration of trust by the mortgagors was obviously money or money's worth, and accordingly this declaration of trust is a bargain and sale and falls to be treated as such. The uses raised by a bargain and sale were not necessarily in favour only of the person himself who paid the consideration; they might be to himself with remainder to other persons, or to other persons alone by his direction: (Sanders on Uses, 5th ed. Vol. II, p. 58: Challis, Real Property, 3rd ed. p. 421 n.).

As is well known, the English Statute of Uses was followed in the same year by the Statute of Inrolments which provided that no lands should pass from one to another whereby an estate of inheritance or freehold should take effect in any person or any use thereof to be made by reason only of any bargain or sale thereof except the said bargain and sale be made by writing indented sealed and inrolled within six months. No separate Statute of Inrolments was enacted in Ireland, but section 17 of the Irish Statute of Uses reproduced in terms these provisions of the English Statute of Inrolments so that after the passing of the Irish statute the legal position in regard to a bargain and sale of freehold lands was the same in Ireland as in England. A mere covenant for valuable consideration that a person should stand seised to the use of another clearly amounted to a bargain and sale within the Statute of Inrolments: (Sanders on Uses, 5th ed. Vol. II, p. 96; *Bedell's case* (1); *Goodtitle and Pettoe* (2) per

(1) (1608) 7 Co. Rep. 40 (*a*), 40 (*b*).

(2) (1731) Fitz.-G. 299, 301.

Raymond L.C.J.). As is said in Bacon's Abridgment (tit. Bargain and Sale (*c*) ) 7th ed. Vol. I, p. 686 : " It is not necessary to use the words bargain and sale, " but any words equivalent are sufficient, and what- " ever words upon valuable consideration would have " raised an use of any lands etc. at common law, the " same amount to a bargain and sale within this Act " (sc. 27 Hen. VIII c. 16) ; as if a man by deed etc. " for a valuable consideration covenants to stand " seised to the use of another etc." It was this necessity of enrolling covenants for valuable consideration to stand seised of freeholds that led to the institution of the system of conveyancing by lease and release which remained for over two hundred years the ordinary method of conveying freehold lands in England. The matter is succinctly put in Jenks' Modern Land Law at p. 304 : " To have allowed a " covenant made in consideration of money or valuable " consideration to escape the Statute of Inrolments " would have been to connive at the grossest evasion " of the intention of Parliament. And accordingly " covenants to stand seised in consideration of value " have always been treated as Bargains and Sales " within the Statute."

If then the covenant in the mortgage is to be regarded as falling within the operation of section 1 of the Irish Statute of Uses it would be subject also to the provisions of section 17 of the Statute and the mortgage deed would require enrolment, unless indeed it were exempted from the necessity of enrolment by section 18 to which I shall advert presently. No evidence was adduced to show that the mortgage was enrolled within six months, as required by section 17. It is, of course, highly improbable that it would ever have occurred to anyone to enrol such a deed, but for the sake of certainty I have caused enquiry to be made in the offices of the court, and I have been informed that in fact the mortgage never was enrolled there.

By a proviso contained in the English Statute of Inrolments it was enacted that lands in cities boroughs or towns corporate that had the privilege of enrolments were not within the Act. Though the intention of the

statute doubtless was to have them excepted from enrolment in the courts at Westminster only, yet the proviso was so worded as to exempt them from any enrolment at all: (Bacon's Abridgment (tit. Bargain and Sales E.2) 7th ed. vol. I, p. 600; *Chibborne's* case (1); *Darby v. Boice* (2)). Section 18 of the Irish Statute of Uses followed exactly the wording of this proviso in the English Statute of Inrolments, and provided "that this act nor anything therein contained "extend to any lands within any city borough or town "corporate wherein the mayors recorders chamber- "laines bayliffs or other officers have authority or have "lawfully used to inroll any evidences deeds or other "writings within their precincts or limits." The effect of this introduction at the end of the Irish Statute of Uses of the proviso to the English Statute of Inrolments would prima facie appear to have the effect of excluding lands in cities boroughs and towns having the privilege of enrolment from the operation of the Irish Statute of Uses altogether, though presumably the intention of the proviso merely was to exclude them from the operation of section 17 of the Irish Statute requiring bargains and sales of freehold lands to be enrolled within six months. However this may be, the question whether Belfast was, at the time of the passing of the Irish Statute of Uses, a town in which the municipal officers had authority or had lawfully used to enroll any evidences deeds or other writings, is of course a question of fact. But no evidence in regard to this question was placed before the court. As is well known Belfast obtained its first charter of incorporation in 1613, and this was the charter in force at the time of the passing of the Irish Statute of Uses in 1634. In order to discover whether the officers of the borough had been granted authority to enroll deeds one naturally turns to the terms of the charter. I have gone carefully through the charter and I cannot find anything in it which I could construe as conferring such authority. And an examination of the earlier entries in the Town Book of Belfast (Mr. R. M. Young's

(1) (1564) Dyer 220.(a) (2) (1607) Yelv. 123.

edition) hardly suggests to me that it could be said in 1634 that these officers had up to then used to enrol evidences deeds or other writings. At any rate there is no evidence before the court to show that Belfast fell in 1634 within the category of cities boroughs and towns exempted from the enrolment provisions of the Irish Statute of Uses, and I assume accordingly that the declaration of trust contained in the mortgage ought to have been enrolled under the provisions of section 17 of the Irish Statute of Uses if the statute were to operate upon it.

What then is the position in regard to a transaction constituting a bargain and sale within the meaning of the statute which is not enrolled within the six months? Though it does not pass the legal estate under the statute it is not a nullity. Equity would treat it as an agreement to convey and would protect the bargainee accordingly : (Cruise's Digest, 4th ed. (1835) vol. IV, p. 251 ; *Mestaer v. Gillespie* (1) per Lord Eldon). In other words the bargainee would be in substantially the same position as he was before the passing of the statute. Before the Statute of Uses the Court of Chancery, upon a bargain and sale for valuable consideration, would have decreed an estate in fee simple in the bargainee even though his heirs had not been mentioned : (Sanders on Uses, 5th ed. vol. I, p. 123 ; *Corbet's* case (2) ; *Shelley's* case (3).) I know of no reason why a different view should now be taken by the courts in a case in which the statute fails to operate by reason of the absence of enrolment. On the other hand it appears to be the better view that a bargain and sale operating under the Statute, if made without words of limitation, will only give the bargainee a life estate at law : (Sanders on Uses, loc. cit. ; Williams on Real Property, 21st ed. p. 203 (n) ).

My view accordingly is that even if we are only to have regard to so much of the covenant in the mortgage

(1) (1805) 11 Ves. 622, 625.
(2) (1600) 1 Co. Rep. 77 (*b*).
(3) (1581) 1 Co. Rep. 88 (*b*), 100 (*b*)

as provides that the mortgagors shall stand seised of the reversion expectant upon the term of 10,000 years in trust for any purchaser or purchasers of the premises, the effect of this provision is not to vest the legal estate in the reversion in the purchaser, but to confer on him an equitable estate in fee. I appreciate that the conveyance of March 18, 1930, only purported to convey to Bennett Sergie the term of 10,000 years, and that perhaps if he had so desired he might have entered into some arrangement or have taken some step to manifest an intention that he was merely taking an assignment of the term itself and was not taking any estate or interest in the reversion. But in the absence of some evidence of such non-acceptance of the rights in regard to the reversion to which, under the terms of the covenant in the mortgage he was entitled as the purchaser of the premises, I am of opinion that he should not be held to have renounced those rights. There does not appear to me to be any reason why he should not have accepted the interest in the reversion to which a purchaser was entitled under the terms of the covenant. So long as the legal estate in the reversion was not vested in him he would not become personally liable to the grantor for the rent and the grantees, covenants under the grant.

In my view, therefore, upon the execution of the conveyance of March 18, 1930, Bennett Sergie became entitled (*a*) to a legal estate in the term of 10,000 years and (*b*) subject to that term of 10,000 years to an equitable estate in the grantees' interest under the fee farm grant. I do not think that this is a case where the doctrine of merger could be invoked, for in no instance can the legal estate merge in the equitable ownership (Mayhew on Merger pp. 7 and 21). In such circumstances, however, since the beneficial interest in the term and the beneficial interest in the reversion had become vested in the same person, the term according to the old authorities would have been regarded as attendant upon the inheritance. If the owner of the term and the reversion had died intestate, his whole interest in the property would have passed to his heir at law and not to his personal representatives. Or if he had made a will devising his realty to one person and

bequeathing his personalty to another, it would have passed to the devisee of the realty: (Cruise's Digest, 4th ed. (1835) vol. I, Tit. XII Trust Ch. III ss. 30,31). "The general rule is, that where the same person has "the inheritance and the term in himself, although he "has in one the equitable interest, and in the other "the legal interest, there the inheritance by implication "draws to itself the term, and makes that attendant "upon it." (Story, Equity Jurisprudence, 10th ed., vol. II, pp. 196-197). It matters not that the person concerned has a legal interest in the term but only an equitable interest in the freehold reversion. "A term "may become attendant upon the inheritance, without "any express declaration for that purpose, either where "the legal interest in the term is vested in the trustee "and the legal freehold in the owner of the inheritance, "or where the owner is beneficially or equitably en-"titled to the inheritance and is legally possessed of "the term, or where the legal estate, both of the term "and of the inheritance, is vested in trustees." (Sanders on Uses, 5th ed. vol. I, p. 318). As instances where the legal estate in the term was held to be attendant on an equitable estate in the freehold reversion I would refer to *Dowse v. Percival* (1); *Cooke v. Cooke* (2); *Capel v. Girdler* (3).

I am accordingly of opinion that whatever in the circumstances may have been the effect of the Satisfied Terms Act, 1845, Bennett Sergie's interest in Bennett Buildings at the time of his death in 1947 was an interest which fell to be treated as real estate. It was therefore an interest which did not pass to his executors as such, and so the estate duty on the property would, by reason of the provisions of section 9 (1) of the Finance Act, 1894, be a charge upon the property itself, unless the burden of the duty is shifted by the terms of Bennett Sergie's will.

I turn now to the second question which was argued before us, namely, whether (on the assumption of course that Bennett Sergie's interest in Bennett Buildings was an interest which did not pass to his executors

(1) (1682) Vern 104.
(2) (1740) 2 Atk. 67.
(3) (1804) 9 Ves. 509

as such) the terms of his will were such as to throw the burden of the estate duty payable in respect of Bennett Buildings upon his residuary estate in relief of the specific devisees of that property.

The appellants base their argument upon the terms of the residuary clause in Bennett Sergie's will, which directs his trustees to convert his residuary real and personal estate into money, and to pay out of the mixed fund thereby created "my debts funeral and testa- "mentary expenses and death duties and all legacies "under this my will or any codicil hereto in case I shall "not have sufficient ready cash to pay same." The appellants contend that this phrase "my . . . death duties" is effectual to direct the payment of the estate duty in respect of Bennett Buildings out of the testator's residuary estate. In the judgment appealed from it has been held that on consideration of the whole of the will this phrase "my . . . death duties" must be construed as referring only to such part of the estate duty as executors are liable to pay in the absence of any specific direction, namely the duty in respect of that portion of the testator's property which in the terms of the Finance Act, 1894, passes to his executors as such.

This is, of course, a question of the construction of the will. We were referred to a considerable number of authorities, but as in all questions of construction, the decision in each case must depend upon the terms of the particular will under consideration, and after reading all the reported decisions bearing on this point which I have been able to trace I do not find that any of them lays down a principle which is clearly decisive of the present case

One or two principles, however, appear to emerge from the decisions. In *In re Pimm* (1) Farwell J. held that the phrase "my duties" in such a connection was prima facie one of wide generality. So far as I am aware this view has never been dissented from, and the same view appears to be taken by Lord Greene M.R. when delivering the judgment of the Court of Appeal in *In re Joel* (2). Accordingly, in the

(1) [1904] 2 Ch. 345. (2) [1943] Ch. 311, 323.

absence of anything in Bennett Sergie's will to show a contrary intention, the phrase "my death duties" would be wide enough to cover the portion of his estate duty which is attributable to Bennett Buildings. Again while undoubtedly the phrase "my testamentary expenses" when used by a testator is sufficient to cover the estate duty in respect of such part of his estate as passes to his executors as such, that is to say his free personalty, yet on the other hand it is well established that estate duty payable in respect of realty is not a testamentary expense (*In re Sharman* (1)). And so a direction to pay "testamentary expenses including death duties" would not be construed to include duties upon property not passing to the executors as such, as for example the estate duty on real estate (*Re Massey* (2)). The appellants accordingly argue that the words "and death duties" in Bennett Sergie's will following as they do the words "my debts funeral and testamentary expenses" must be regarded as referring to something more than what would be included in "testamentary expenses," otherwise these words "and death duties" would be otiose. Another point which, perhaps, should not be left out of consideration is the principle for which there is the authority of the English Court of Appeal in *In re Owers* (3) that inasmuch as a general direction to pay legacies out of a mixed fund or residue charges them rateably on the portion attributable to realty and personalty, it follows that so far as the legacies are payable out of the portion attributable to realty they must bear their own estate duty, notwithstanding a direction to pay "testamentary expenses" out of the mixed fund. In the present case it appears from the Inland Revenue affidavit that the testator was possessed of real estate of very considerable value so that, if the decision under appeal stands, the pecuniary legatees, whose legacies the testator had expressly declared to be free of legacy duty, will presumably have to bear quite an appreciable burden of estate duty.

The respondents in this part of the case relied on

(1) [1901] 2 Ch. 280.
(2) (1921) 90 L.J. Ch. 40.
(3) [1941] Ch. 17.

such authorities as *In re Massey* (1) and *In re Borough* (2) in which it was held that where under a will some legacies had been given expressly free of duty and others were not expressed to be free of duty, a general direction to pay death duties out of residue did not extend to the legacy duty on the legacies not given free of duty.

To hold otherwise would have been inconsistent with the discrimination which the testator had obviously been making between the different legatees. So in *In re King* (3) the Court of Appeal held that in a will where some devises were expressed to be free of duties and others were not, a general direction to pay out of residue " all duties payable in respect of my estate " did not relieve the latter class of devises from their proportion of estate duty. And this decision was followed by Uthwatt J. in *In re Palmer* (4). I respectfully accept these decisions but I am not satisfied that they apply to the will under consideration in the present case. The argument of the respondents is based entirely on the fact that in Bennett Sergie's will some of the legacies are expressed to be free of legacy duty and others are not. It may well be that it would be inconsistent with this discrimination to hold that the phrase " my death duties " was wide enough to include legacy duty. But it does not appear to follow that there would be any inconsistency in holding it wide enough to cover the estate duty on real property, a duty which it would normally include in the absence of any indication in the will to the contrary. Estate duty and legacy duty are two quite different types of duty. Estate duty, which was first introduced by the Finance Act, 1894, becomes payable on a person's death upon the whole of his property, whatever may be the dispositions of it made by his will, or even if he makes no disposition of it at all and dies intestate. Legacy duty, on the other hand, was leviable under much earlier Acts, and the rates at which it was payable varied over a wide range according to the relationship of the beneficiary to the deceased. In one case indeed, that of a legacy for

(1) (1921) 90 L.J. Ch. 40.
(2) [1938] 1 All E.R. 375.
(3) [1942] Ch. 413.
(4) [1946] Ch. 49.

charitable purposes in Ireland, no legacy duty was payable at all by virtue of the provisions of 5 & 6 Vict. c. 82, s. 38. I think that the most natural conclusion on reading Bennett Sergie's will is that the expression " my death duties " is wide enough to cover all the duties payable merely in consequence of his death, whatever his testamentary dispositions may be, even though by reason of the discrimination shown in other parts of the will it may not be wide enough to cover a duty not payable merely in consequence of his death but leviable because of some particular disposition of his will. This view is, to my mind, reinforced by the consideration urged by the appellants that if the phrase " and death duties " is construed as meaning only the estate duty payable in respect of personalty it adds nothing to the preceding phrase " my testamentary expenses." No canon of construction is more firmly established than that in construing a will we must, if possible, give a meaning to every word used : see the authorities collected in the *English and Empire Digest* vol. 44, pp. 574-575. " Now I take it to be one " rule in the construction of a will, that you are not to " impute to a testator, unless the context requires it, " that he uses additional words except for some " additional purpose ; that you are not to suppose he " uses additional words for no purpose " : *Oddie v. Woodford* (1) per Lord Eldon. If we are to give the words " and death duties " in Bennett Sergie's will any meaning at all additional to that conveyed by the preceding words " testamentary expenses " the words must be held to be wide enough to cover the duty at issue in this appeal. It is to be noted that the very similar clause which was before the Court in the case of *In re Owers* (2) did not contain these additional words " and death duties." Nor do I think that the consequences in the light of the decision in *In re Owers* (2) if the respondents' contention in the present case were held to be correct should be wholly overlooked. The result would be that legacies which the testator had expressly designed to be free of legacy duty would apparently be subject to a substantial burden

(1) (1825) 3 My. & Cr. 584, 614.

(2) [1941] Ch. 17.

of estate duty. This would be an odd result. It is, of course, a possible result, as is indeed shown by *In re Owers* (1). But where one possible construction of a clause in a will leads to an odd result, while another possible construction does not, this I think is some slight indication in favour of the latter construction.

On the whole, therefore, with the natural hesitation which I feel in differing from the view taken by the Lord Chief Justice on a very arguable point of construction, I am of opinion that under the terms of Bennett Sergie's will the estate duty on the property known as Bennett Buildings is payable out of his residuary estate.

CURRAN J. : I agree with the conclusion arrived at in each of the judgments just read as to the true construction of the will of Bennett Sergie deceased.

If there is a difficulty in construing the will it appears to me to be limited to the question whether the expression " death duties " in the will includes " legacy duty," having regard to the fact that certain legacies in the will were expressly given free of such duty and others were not.

We are concerned in the present case with " estate duty " which is undoubtedly covered by the term " death duties." I see no difficulty, accordingly, in giving effect to the testator's express provision that the executors are to pay his " death duties " by finding that the executors must pay the estate duty payable inter alia in respect of Bennett Buildings.

*Appeal allowed.*

Solicitors for the executors : *J. A. Culbert & Martin.*
Solicitor for Elizabeth Hall : *George H. Leitch.*
Solicitor for Rosie Grossman and Rachel Levine : *L. I. G. Fox.*
Solicitors for the Management Committees : *C. & J. Black.*
Solicitors for the Mater Infirmorum Hospital : *F. Kerr & Co.*
Solicitor for Ettie Goldie : *P. Gorfunkle.*

(1) [1941] Ch. 17. J.P.

## KELLY v. FARRANS LTD. (1)

*Negligence—Master and servant—Volenti non fit injuria—Contributory negligence—Law Reform (Miscellaneous Provisions) Act (Northern Ireland)*, 1948 (12 & 13 *Geo.* 6, *c.* 23), *ss.* 2, 3.

In an action for damages for personal injuries caused by negligence the defendants pleaded volenti non fit injuria and contributory negligence. The trial judge declined to leave the issue of volenti non fit injuria to the jury, and on the issue of contributory negligence he told the jury that if they found that the plaintiff was guilty of negligence contributing to the accident they need not reduce the damages in exact proportion to the degree of negligence on the plaintiff's part. He also told the jury that in taking into account one half of the value of the rights referred to in s. 3 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, they need not deduct the full amount of such one half.

*Held*, (i) the question raised by a plea of volenti non fit injuria is not whether the plaintiff consented to run the risk of hurt but whether he consented to the lack of care which may produce that risk, and that on the facts of the case there was no material on which a jury could find that the plaintiff had freely and voluntarily assented to the risk of loss resulting from the defendants' lack of care falling upon him rather than upon the defendants; (ii) though s. 2 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, does not require that the claimant's share in the responsibility for the damage shall be settled in an arithmetical manner by describing it in terms of a fraction or percentage, yet if such a method is adopted the arithmetical measure cannot be departed from in assessing the amount by which the claimant's damages shall be reduced; (iii) the direction in s. 3 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, to "take into account" one half of the value of the rights referred to in that section requires a deduction of the amount of such figure when ascertained.

APPEAL against judgment entered for the plaintiff by Sheil J. at the trial of an action.

On October 25, 1951, the plaintiff, while working in the employment of the defendants as a pneumatic driller, met with an accident in which he was seriously hurt. He claimed damages in respect of this injury from his employers, alleging negligence in failing to provide a safe place of work and a safe system of work. The work in hand was the excavating of a trench for a

(1) In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.; April 21, 22; May 18, 1953.

sewer on the highway between Whitehead and Carrickfergus. The plaintiff's task was to break up the hard surface with his drill. He worked backwards along the site of the trench, which was to be some three feet wide, and got down about nine inches over the length he had to do. With this first layer thus loosened he went to the charge-hand and asked to be given a labourer to shovel off the loose stuff. The charge-hand told him there was not a labourer available and that he was to carry on and do the best he could. According to the plaintiff the machine-man in charge of a mechanical excavator then scraped the loose stuff off with the bucket of his machine. Thereupon the plaintiff loosened a second layer and this was scraped off by the machine-man as before. The plaintiff then began to loosen a third layer. His description of what happened at this stage is recorded in the judge's notes as follows: "I started to go over it a third time and "the conditions were very poor in the trench—nearly "as much stuff in the track as he (the machine-man) "was lifting out—it was all humps and hollows. I "was doing the best I could and the point of the "hammer got wedged and I gave it about four or "five pulls and it never came out. Then I put the "air on the hammer and gave it a good pull. It came "out, hit me on the stomach and I could not lift my "feet in time to save myself and I fell and the hammer "fell on top of me. There was that much stuff lying "about I couldn't lift my feet over in time. The "hammer is about six or seven stone. Don't think I "would have fallen if ground clear behind me. I "called on Mr. McMurtry to lift hammer off. He did "so and he gave me a lift up on to side of bank. I was "in bad pain." He said he did not understand from what the charge-hand had said to him that he was to clear out the rubble himself. He might, at times have cleared out stones himself, but according to him this was not usual. In the course of cross-examination he agreed that when walking on the rough surface one had to watch one's feet, and later he said—"I lost my "balance through the stuff behind me. If clear "behind me I would not have fallen. I was standing "on rocky stones when pulling—loose stones. It was

" a foolish thing to work on loose stones but when you " have a family you just go on. Nobody was going to " measure up how much I cut. I could have got a " spade. Not a practice for Hamilton (another driller) " and myself to clear away our own trenches."

In their defence the defendants denied negligence, alleged contributory negligence and pleaded volenti non fit injuria.

At the conclusion of the evidence the judge refused to leave any issue on this last plea to the jury. The questions which were left and the answers to them were as follows:

1. Did the defendants fail to provide a safe system of work? *Answer:* Yes.
2. Did the defendants fail to provide a safe place of work? *Answer:* No.
3. If the answer to question 1 and/or 2 be " Yes " was the accident caused or contributed to by such failure? *Answer:* Yes.
4. If the answers 1 and/or 2 be " Yes " to what damages is the plaintiff entitled on the basis that such failure was the sole cause of the accident? *Answer:* £2,280.
5. Was the plaintiff guilty of negligence? *Answer:* Yes.
6. If the answer to question 5 be " Yes " was the accident caused or contributed to by such negligence? *Answer:* Yes.
7. If the accident was caused partly by negligence of the plaintiff to what sum is it just and reasonable that the total damages (question 4) should be reduced having regard to the plaintiff's negligence? *Answer:* £2,052.

On these findings judgment was entered for the plaintiff.

The defendants appealed to have the judgment set aside and a new trial ordered.

*Harrison Q.C.* and *Brown* for the defendants and appellants.

*Agnew Q.C.* and *O'Donnell* for the plaintiff and respondent.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J. stated the facts and continued :

The defendants now seek to have this judgment set aside and a new trial ordered on three grounds. Two of these relate to the quantum of damages and will be considered later. The other, which is directed to liability alone, may conveniently be dealt with now. It is stated thus in the notice of appeal—

> " That there was evidence in support of the defend-
> " ants' case on the issue of volenti non fit injuria
> " proper to be left to the jury, and that the learned
> " trial judge was wrong in law in not leaving this
> " issue to the jury."

For present purposes it is unnecessary to enter upon the controversies of fact disclosed in the evidence, but I should perhaps add at this juncture that according to the witnesses called for the defendants there was no reason why the plaintiff as a pneumatic driller, should not have cleared the trench himself in the absence of a labourer to do this for him. They said, indeed, that such was the practice and that the plaintiff had previously acted in conformity with it.

In the course of the argument before us counsel for the defendants conceded that there was evidence sufficient to sustain the jury's answer to question 1. In view of this and of the answers to questions 3, 5 and 6, which also went without challenge, the issue under discussion must be considered on the basis that the defendants negligently failed to provide a safe system of work and that the plaintiff did not take due care for his own safety. Having considered the whole of the evidence the only negligence on the part of the plaintiff that I am able to discern is that he proceeded to work on a bad footing when he might have cleared the loose material out of his way had he been minded to do so. And the only failure to provide a safe system of work seems to have lain in the failure to provide a labourer to clear the trench of the material loosened by the plaintiff. I can see no other defect in the system of work and nothing else was suggested against it in the course of the argument. I do not desire to question the propriety of the concession made by counsel for

the defendants that there was evidence on which the jury might arrive at the answer they gave to question 1. None the less, the case against the defendants was anything but cogent and it would, I think have been equally open to the jury on the evidence to find that there had been no failure to provide a safe system of work. The question, of course, was one of fact for the jury, and if their view was—as I think it must have been —that the defendants should have provided a labourer at all material times to do for the plaintiff what, at the time of the accident, he was at fault in not doing for himself, it must be accepted in the circumstances of the case. But the weight, or lack of weight, of the material used to fix the defendants with liability remains, in my opinion, relevant when one comes to the plea of volenti, for the fact that the negligence relied upon was debateable and not obvious, though in no way conclusive, can hardly be left out of consideration in any enquiry directed to ascertain just what risk (if any) it was that the plaintiff freely and with full knowledge agreed to accept.

In claims for damages for personal injury caused by negligence the question raised by a plea of volenti is not whether the injured party consented to run the risk of being hurt, but whether he consented to run that risk at his own expense so that he, and not the party alleged to be negligent, should bear the loss in the event of injury. In other words, the consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk. In the relationship of master and servant this distinction does not appear to have been clearly drawn until the latter part of last century. But in *Smith v. Baker* (1), it is plainly recognised by Lord Watson when he says: "The question which has most frequently "to be considered is not whether he (the workman) "voluntarily and rashly exposed himself to injury, "but whether he agreed that, if injury should befall "him, the risk was to be his and not his master's"; and also by Lord Herschell in the following passage:

(1) [1891] A.C. 325, 355, 362.

" Whatever the dangers of the employment which the " employed undertakes,"—and that, as the context shows, refers to the contract of service —" amongst " them is certainly not to be numbered the risk of the " employer's negligence, and the creation or enhance- " ment of danger thereby engendered. If, then, the " employer thus fails in his duty towards the employed, " I do not think that because he does not straightway " refuse to continue his service, it is true to say that " he is willing that his employer should thus act " towards him." The distinction thus drawn has remained a part of our jurisprudence in this sphere. In *Bowater v. Rowley Regis Corporation* (1) Goddard L.J. (as he then was) put it in a sentence when he said that to make out the defence of volenti—" It must be shown " that he (the workman)agreed that what risk there " was should lie on him." Lie on him, that is, instead of on his employer. If the willingness has not got that length, the employer has not been absolved from his duty and the right to compensation has not been lost.

The soundness of this distinction in point of law was not disputed before us, but counsel for the defendants submitted that once it was shown that the injured workman knew and appreciated the nature of the risk of injury which he ran, then there was evidence on which a jury could uphold the plea of volenti. In other words, though to be sciens is not necessarily to be volens, the latter state may be inferred once there is evidence of the former.

Now, if this proposition is well founded it follows that the learned judge should have left the volenti issue to the jury, for there was certainly material on which they might have found that the plaintiff knew and appreciated what the risk of injury was if he worked his drill while standing on a loose and uneven footing. Here and there in the earlier cases may be found dicta which appear to lend support to the view that evidence of mere knowledge on the part of a claimant raises some sort of presumption that he was volens. But

(1) [1944] K.B. 476.

these dicta seem to me to reflect the confusion between risk of injury and risk of loss which existed before the distinction I have already mentioned came to be recognised, and I do not regard them as authoritative. No doubt evidence of knowledge may sometimes be evidence of the assumption of the risk of loss, but in the nature of things this need not always be so. Each case must be judged on its own facts; it is for the defence to establish the plea of volenti and whether or not this has been done in any given instance depends, not on an arbitrary rule as to what may be inferred from knowledge alone, but on the value and effect of the evidence as a whole.

The question here, therefore is whether there was material on which a reasonable jury might have found that the plaintiff freely and voluntarily assented to the risk of loss, should he be injured, falling upon him and not upon the defendants. In my opinion there was no such material. I can find nothing in the record to suggest that, if the plaintiff were conscious of any shortcoming on the part of his employer, he was willing to waive or forego his rights in respect thereof should he suffer in consequence. That he was careless for his own safety seems to me beside the point in the circumstances of this particular case. It was common ground that he continued to work after being told to carry on and do the best he could. At the trial he was never asked if, when complying with this direction, he was content that the risk should be on him in exoneration of his employers. The defendants now say that the jury might have answered that question in their favour had it been submitted to them. In my opinion had the jury been allowed to find for the defendants on the volenti issue the finding would plainly have been assailable on the ground that the evidence was quite insufficient to sustain it. I think the learned judge was entirely right in withholding this issue and I am therefore against the defendants on the first ground of appeal.

The second ground of appeal is stated in the notice of appeal as follows:

"That the learned trial judge misdirected the jury

" by directing them that if they were satisfied that " the plaintiff was guilty of negligence contributing " to the accident, the jury need not fine the plaintiff " in proportion to the degree of negligence on his " part."

No objection was made to the charge at the time, either orally or by written requisition. But in submitting his report of the trial the learned judge says, in reference to this ground, that the formula he always uses in charging juries on this matter, namely the effect of a finding of contributory negligence on the question of damages, is to tell them " that they are not bound " to deduct damages—or, as I have called it, ' fine '— " a plaintiff in the exact proportion of their estimate " of his negligence." " I tell them " he adds " they " can do so but are not bound to do so." I take this as meaning that if a jury consider a plaintiff to be, say, one-third responsible for the event causing the damage they need not reduce the total damages by that fraction unless they think fit. It seems to me that this direction is not in conformity with the part of section 2 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, which reads :—

" Where any person suffers damage as the result " partly of his own fault and partly of the fault of " any other person or persons, a claim in respect of " that damage shall not be defeated by reason of " the fault of the person suffering the damage, but " the damages recoverable in respect thereof shall " be reduced to such extent as the court thinks just " and equitable having regard to the claimant's " share in the responsibility for the damage :"

In my opinion this enactment does not make it obligatory for the court to settle the claimant's share in the responsibility for the damage in an arithmetical manner, as by describing it in terms of a fraction or percentage. The first step is to find what the total damages are irrespective of the claimant's fault. But that done, I see no reason why the court should not proceed at once to reduce those damages as it " thinks just and " equitable having regard to the claimant's share in " the responsibility for the damage." That is one way

of giving effect to section 2 (1) and I see no objection to it. Indeed, I think it likely that the departure here from the wording of section 1 (1) of the Maritime Conventions Act, 1911, may have been intended to facilitate this method of approaching the problem as being, on occasion, more appropriate in the wider field to which the Act of 1948 relates. But another way of arriving at the same result, and one which it is often convenient to employ, is to fix the claimant's share in the responsibility in an arithmetical manner and then proceed to the reduction of the total damages. Now, if this is the method employed it seems to me wrong to say that one is at liberty to disregard the arithmetical measure of the claimant's share in the responsibility when reducing the total damages. The subsection says that these are to be reduced "to such "extent as the court thinks just and equitable having "regard to the claimant's share in the responsiblity for "the damage." The statute brings no other element into consideration and I find it difficult to see how, if the claimant's share in the responsibility is measured by one fraction it will be just and equitable to reduce the total damages by another. I therefore respectfully disagree with the learned judge's usual way of putting the matter. I think in most cases where this enactment applies it is preferable to draw the jury's attention to its terms and tell them that having found the total damages without reference to the plaintiff's fault their next duty is to find to what sum those damages should be reduced on account of the plaintiff's fault, and that the amount of the reduction should be such as is just and equitable having regard to the claimant's share in the responsibility for the damage. I see no reason why juries should not be informed, in suitable cases, of the alternative method of arriving at this result which I have just mentioned, but where that method has been followed I think they ought to be told that the scaling down of the total damages is not at large but should be proportionate to the degree of responsibility for the damage which they consider attributable to the plaintiff.

The third ground as stated in the notice of appeal was :

" That the learned trial judge misdirected the jury " by directing them that in taking into account one " half of the value of the rights referred to in section " 3 (1) of the Law Reform (Miscellaneous Provisions) " Act (Northern Ireland). 1948, they need not deduct " the full amount of such one half in answering " question 4 on the issue paper."

Here, again, there was neither objection nor requisition at the trial, but the learned judge's report indicates that the direction complained of accords with his usual practice, for he says : " In like manner as to " benefits I tell them (the jury) that they are to take " them into account but are not bound to make an " exact deduction. I should think I used that formula " in this case. If, in the notice of appeal the word " ' need ' is intended to convey that suggestion, it is " correct."

In the cases to which it applies section 3 (1) of the Act of 1948 necessitates what may well be a difficult and even speculative computation, involving, as it generally must, not only the value of rights actually accrued but the value of rights which probably will accrue in the future and before the expiration of five years from the time when the cause of action arose. But however difficult this computation may be, the subsection clearly contemplates that a definite sum will be found as the value of these benefit rights and clearly directs that one-half thereof shall be " taken " into account " against any loss of earnings or profits in assessing damages. It is obvious that " taken into " account " means taken into account by way of deduction and I do not see how a definite figure can be taken into account in this way as directed unless by reducing the loss in respect of earnings or profits by the actual amount of such figure, or, of course, the amount of such loss if that be less. If this is not done I do not know on what principle one may work out the policy and the terms of this provision. I therefore think the learned judge was wrong in his direction to the jury on this branch of the case.

In the ordinary course of events the next question for consideration would have been whether or not there should be a new trial on account of these misdirections respecting the assessment of damages. Since the hearing, however, we have been informed by counsel that, should this court find against the appellants on what I have referred to as the first ground of appeal, but in their favour on the second or third grounds, the parties would be prepared to agree on a sum for damages which would obviate any question of another trial. As the views which I have expressed on the several grounds of appeal are also the views of the court the claim for a new trial, is in the circumstances, no longer a live issue and I therefore refrain from expressing an opinion upon it.

PORTER L.J.: The main question in this appeal is whether the trial judge was right in refusing to leave to the jury the issue raised by the plea of volenti non fit injuria.

The plaintiff, who was employed in excavating a trench with a pneumatic drill, had asked the foreman ganger for a labourer to shovel the loose material out of the trench. The ganger told him that no labourer was then available, and that he should carry on and do the best he could. When he was working over the loose rough ground the point of the hammer got wedged, and after four or five ineffectual attempts to extricate it, he put the air on the hammer and gave it a good pull. It came out, hit him on the stomach, and knocked him over on his back so that he fell with the heavy hammer on top of him and seriously injured his back.

There is no manual occupation which is altogether free from risk of some kind, but no one would contend that the work of a pneumatic driller was a dangerous occupation or that the nature or extent of the risk involved in his work was anything like that of the risk encountered by the workman in *Smith v. Baker* (1), when heavy stones were swung by a crane over his head without warning, or even the risk of the carter

(1) [1891] A.C. 325.

who was injured in attempting to control the unmanageable horse in *Bowater v. Rowley Regis Corporation* (1).

The cause of the additional risk involved in operating the drill over the loose rough ground was the refusal of the foreman to provide him with a labourer to clear away the loosened stones, and the order to carry on and do the best he could. Even with this additional risk, created as the jury held, by the negligence of the defendants in failing to provide a safe system of work. I do not think that the occupation could be described as dangerous in the sense that the risk was obvious, probable, or serious. It is true that the plaintiff said in cross-examination, "It was a foolish thing to work "on loose stones but when you have a family you just "go on", but this admission cannot reasonably be taken as meaning that he decided to carry on in spite of the fact that he realized that it was foolish to do so. He was not describing his state of mind when he was told to carry on. In the light of what happened he was admitting in the witness box that it was a foolish thing to carry on and work on the loose stones. It is easy to be wise after the event.

That the plaintiff knew there was some risk in working over the loose stones can hardly be denied, but this is very far from saying that he freely and voluntarily agreed to undertake the risk or even that he appreciated the nature and extent of it.

On this issue the burden of proof lay on the defendants, and the trial judge, in considering whether he ought or ought not to leave the question to the jury, had to determine whether there was evidence on which the jury might reasonably and properly find that the plaintiff, with full knowledge of the risk, freely and voluntarily agreed that if injury should befall him the risk was to be his and not his employer's.

It seems to me that the case is completely covered by the oft cited passage in Lord Herschell's speech in *Smith v. Baker* (2): "Where a servant has been sub-"jected to risk owing to a breach of duty on the part

(1) [1944] K.B. 476. (2) [1891] A.C. 325, 365.

" of his employer, the mere fact that he continues his " work even though he knows of the risk and does not " remonstrate does not preclude his recovering in " respect of the breach of duty by reason of the doctrine " ' volenti non fit injuria ' which in my opinion has " no application to such a case."

It is true that the plaintiff did not remonstrate, but his conduct shews that he was not satisfied to continue his work without the assistance of a labourer. After completing the first layer he stopped work and went away to the foreman ganger who was working about 150 yards off, and asked him for a labourer to shovel away the rough earth and stones. The foreman told him that no labourer was available at that time and ordered him to carry on and do the best he could, and it was while he was working in obedience to this specific order that he was injured. If the risk of injury in carrying on the drilling operation was remote and unforeseeable, as I think it was, it cannot be said that he fully appreciated it, and if he did not fully appreciate it, he could not be said to have agreed to undertake it and to relieve his employers of all responsibility for any damage caused thereby.

In my opinion the learned trial judge was right in refusing to leave the question to the jury.

As regards the second and the third ground of the appeal, I am so entirely in agreement with the Lord Chief Justice that I have nothing to add.

BLACK L.J. : I have had the opportunity of reading the judgment delivered by the Lord Chief Justice. I entirely concur with his judgment and do not think any purpose would be served by delivering a separate judgment of my own.

*Appeal dismissed. Order of court below varied by consent as to the amount of damages.*

Solicitors for the appellants : *C. & H. Jefferson.*
Solicitor for the respondent : *M. G. Bready.*

S.M.M.

## COMMISSIONER OF VALUATION v. McALLISTER (1).

*Valuation—Rating—Industrial hereditament—Egg-packing station —"Adapting for sale"—"Article"—Rating and Valuation (Apportionment) Act (Northern Ireland)*, 1928 (18 & 19 Geo. 5, c. 30), s. 4—*Factory and Workshop Act*, 1901 (1 *Edw.* 7, c. 22), s. 149 (1).

Premises to which eggs are delivered in bulk for the purposes of testing, grading, stamping and packing, are premises used for the purpose of adapting articles for sale and are therefore an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928.

APPEAL to the Court of Appeal from the decision of Sheil J. on the hearing of a case stated by the Recorder of Belfast.

The Commissioner of Valuation having refused to distinguish the respondent's premises situate at 399a Upper Newtownards Road, Belfast, as an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, the respondent appealed to the Recorder of Belfast, who reversed the decision of the Commissioner and stated a case for the opinion of the High Court.

The Recorder found the following facts. The respondent was the holder of a class A licence from the Ministry of Agriculture issued under the Marketing of Eggs (Northern Ireland) Acts, 1924 to 1937. Eggs in clean condition were delivered at the premises in cases, either by the respondent's own lorries or by class B licence holders who purchased from the producers and re-sold to the respondent. The respondent was forbidden by rule 14 of the Marketing of Eggs Rules (S.R. & O. (N.I.), 1938, No. 10), to wash, steep or otherwise clean any eggs in his possession. If any unclean eggs were found among those purchased by him they were classed as seconds. The eggs were

(1) In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.; November 2, 3, 4; December 21, 1953.

first tested by the light test, known as "candling" for quality, and were classed as first quality, seconds or rejects. All first quality eggs were placed by hand on a mechanical grading machine (of which there were five) where they were weighed individually, stamped automatically, and sorted into four classes according to weight. When so graded and stamped all eggs except rejects and badly cracked eggs were placed in boxes which contained thirty dozen each. These boxes of graded eggs were shipped by the respondent or delivered by him to retailers as directed by the Ministry of Agriculture or the Ministry of Food without entering any other premises of the respondent. Four persons were employed at each grading machine, two in candling and two in sorting. At the height of the season all the machines were in operation, but at other times some of the staff were employed in moving and marking egg crates and other duties directly connected with the main purpose of the hereditament. Persons employed on the testing machines were skilled workers who had undergone a test by the Ministry of Agriculture. Badly cracked eggs were broken into liquid form, strained to remove portions of broken shell and sold to bakeries. The number of broken out eggs would probably not exceed one per cent of the total quantity handled on the premises, and it was agreed that this process did not affect in any way the general character of the hereditament. The annual number of eggs dealt with on the premises was approximately nineteen million.

On the hearing of the case stated Sheil J. held that the decision of the Recorder was right and that the premises were an industrial hereditament within the meaning of the relevant legislation. The Commissioner appealed to the Court of Appeal.

*Harrison Q.C.* and *Lowry* for the appellant. In *Richardson & Son v. Middlesbrough Assessment Committee* (1) which was followed in *Armour & Co., Ltd.v. Commissioner of Valuation* (2) the eggs were cleaned on the premises, and while we wish to keep open the

(1) [1947] K.B. 958. (2) (1951) 86 I.L.T.R. 3.

differences of fact between the former case and the present one, it is submitted that both these cases were wrongly decided. Adapting for sale clearly points to something being done to the article in question which in some way makes it in itself a little different from what it was before. Where all that has been done is to sort, store pack and then dispatch the article it is a misuse of language to say that there has been an adapting for sale. It is not correct to say that any dealing with goods so that they may be more suitably sold, involving no alteration of the character, can amount to an adaptation for sale.

[LORD MACDERMOTT L.C.J. : It is necessary to know what the article is. Do you say here that the article is the individual egg ?]

Yes. Not eggs or crates of eggs or an amorphous mass of eggs, but the individual egg. There is nothing done on this hereditament except acts which are incidental to the legal control of distribution from the hen to the consumer. The stamping of the eggs does not alter their character. The effect of stamping is fully covered by *Grove v. Lloyd's British Testing Co., Ltd.* (1). A mere process of selection is not adapting for sale : *Davis Cohen & Sons, Ltd. v. Hall* (2). The process must involve a change from an unfinished article to a finished one : *Sedgwick v. Watney, Combe, and Reid & Co.* (3). A distinction must be drawn between adaptation for distribution and adaptation for sale. It is the ultimate requirement of the consumer which must be looked to and not merely the convenience of the trade.

*Jones Q.C.* and *Rowland* for the respondent. In this case the sorting and selection is of a complicated and substantial character and is an adapting for sale : *Bailey v. Stoke-on Trent Assessment Committee and Potteries Electric Traction Co., Ltd.* (4), per Scrutton L.J. The process must be regarded as a whole : *Moon v. London County Council* (5). In order to

(1) [1931] A.C. 446.
(2) [1952] 1 All E.R. 157.
(3) [1931] A.C. 447.
(4) [1931] 1 K.B. 385, 494.
(5) [1931] A.C. 151.

ascertain the article one must stand at the door of the premises and see what the occupier deals in. It is quite obvious in this case that what is dealt in is not individual eggs but crates of eggs. Looking at the process as a whole the purpose of it is to achieve order out of chaos. The mass of eggs coming into the premises could not be legally sold, but when the process of testing, sorting and stamping is complete a marketable article is produced. Lord Sands, whose dissenting judgment in *Inland Revenue Officer v. Easson Bros.* (1) was approved in *Kaye v. Burrows* (2) said : " I am " fortified in the conclusion to which I have come by " the consideration that to exclude premises in which " such work as is here in question (rag sorting and " packing) is carried on from the protection of the " Factory Acts and the benefit of derating is, in my " view, to make an arbitrary and unreasonable dis- " crimination."

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J. : The question in this appeal is whether the respondent's premises at 399a Upper Newtownards Road, Belfast ought to be distinguished in the valuation list as an industrial hereditament within the meaning of section 4 of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928. This turns on whether the activity carried on within the premises and described in the case stated is " the adapting for sale of " any article " as that expression is used in section 149 (1) (c) (iii) of the Factory and Workshop Act, 1901. If it is, then, admittedly, the premises are an industrial hereditament and the appeal should be dismissed ; but, if not, the premises fall outside that category and the appeal should be allowed.

The material facts may be summarised as follows. The respondent carries on upon the premises the business of a wholesale dealer in eggs under what is known as a class ' A ' licence issued by the Ministry of

(1) [1930] S.C. 480, 485. (2) [1931] A.C. 454.

Agriculture pursuant to the provisions of the Marketing of Eggs Acts (Northern Ireland), 1924-1937. Eggs purchased by the respondent are delivered at the premises in cases. They are supposed to be then in a clean condition, and the respondent is forbidden by rule 14 of the Marketing of Eggs Rules (Northern Ireland), 1938, to wash, steep, or otherwise clean any eggs in his possession. If he finds unclean eggs among those purchased he must class them as "seconds." The annual number of eggs dealt with on the premises is approximately nineteen million. Badly cracked eggs are broken out and dealt with in liquid form, but this does not involve more than about one per cent. of the total quantity handled and is not in itself significant. The other eggs are first tested for quality by "candling"—a skilled occupation—and classed as first quality, seconds or rejects. The first quality eggs are then placed on mechanical grading machines where they are weighed individually, stamped automatically, and separated into four grades according to weight. When graded and stamped so as to indicate their classification the eggs, other than rejects and those broken out, are placed in boxes containing thirty dozen each and are then shipped or delivered by the respondent to retailers as directed by the Ministry of Agriculture or the Ministry of Food. The respondent cannot lawfully dispose of the eggs as they are delivered at the premises. The effect of the relevant statutory regulations is that before he sells or disposes of them they must be tested, graded, stamped and packed in accordance with certain prescribed conditions.

Now before one can apply the expression "the adapting for sale of any article" to a single thing—e.g. an egg instead of a case of eggs, a brick instead of a load of bricks, a grain of seed instead of seed in bulk, or a rag instead of a bale of rags—it seems to me that one must find that the adapting process has worked some sort of change in the physical character of the article. In *Grove v. Lloyd's British Testing Company Limited* (1), the premises under consideration were used for testing

(1) [1931] A.C. 446, 467.

cables, and the House of Lords held that testing a cable was not an adapting for sale. The opinion of the House was expressed by Lord Dunedin who said: "I think 'adapting for sale' points clearly to some-thing being done to the article in question which, in some way, makes it in itself a little different from what it was before." Mr. Jones for the respondent pointed to the fact that section 149 (1) of the Factory and Workshop Act, 1901, refers to "the altering" as well as "the adapting for sale" of any article and drew attention to a passage in the judgment of Scrutton L.J in *Bailey v. Potteries Electric Construction Company, Limited* (1), which reads: "Where substantial changes are made in the article, as in the seed-cleaning case, I see no difficulty in holding the process to be adapting for sale. But in view of the fact that 'adapting for sale' is a separate head from altering, I see no reason for requiring alteration of substance to make 'adapting for sale.' If this were necessary there would be no need to insert "'adapting for sale'." I think Scrutton L.J. was directing his mind here to articles in bulk rather than to single articles, and I do not think what he said can be regarded as qualifying, as respects single articles, the view expressed by Lord Dunedin. That view was accepted by Evershed M.R. as supplying the appropriate test in *Cockram v. Tropical Preservation Company Limited* (2). In my opinion it was clearly part of the *ratio* and must be taken as authoritative.

The contention for the appellant was that the test thus enunciated by Lord Dunedin fell to be applied in this case to a single thing, that is to say, to each egg and not to eggs in bulk. If that is right I think the appeal should succeed as (apart from broken eggs which may be left out of account for this purpose) the whole process leaves the individual egg that passes through it just as it was on delivery to the premises save for the fact that it goes out with a classification mark stamped on its shell. At first I was inclined to

(1) [1931] 1 K.B. 385, 495. (2) [1951] 2 K.B. 827, 833.

the view that the stamping process would effect a sufficient physical change to amount to an adapting for sale. But on consideration I do not think this point is now open. In *Grove v. Lloyd's British Testing Company Limited* (1) the Anchors and Chain Cables Act, 1899—to comply with which the testing was done—provided that a testing mark should be stamped on every five fathoms of chain cable proved in accordance with its provisions, and it was argued for the occupiers that the testing involved a physical change and that the mark put upon the article made it saleable. In his opinion Lord Dunedin refers to a testing certificate but not to the testing mark, and he therefore does not deal expressly with the point. But it was made and it failed, and I do not think the stamping of these eggs can be distinguished from it or taken any further.

Had the eggs been washed the situation might well be different, as cleaning a dirty egg produces an important change and would seem, prima facie, to be an adapting. On the facts, however, this consideration does not arise and I therefore conclude that in this case, if "the adapting for sale of any article" means the adapting for sale of each egg, there has been no such adaptation.

But if, on the other hand, the words "any article" should in this instance be related not to a single egg but to eggs in bulk, then different considerations may apply as the scope for adaptation may be wider when "any article" is a collection or conglomeration of single things than when it is but one single thing. With the latter, I think, as I have already indicated, that one must find some degree of physical change before there can be an adapting for sale, but with the former the authorities suggest that in certain circumstances there may be an adapting for sale in bulk without any alteration in the physical state or quality of the items constituting the bulk. Two further questions therefore require an answer for the determination of this appeal—(1) on the facts should "any article" be applied to the single egg or to eggs in bulk? and (2)

(1) [1931] A.C. 446.

if the answer to (1) is eggs in bulk has there been an adapting for sale ?

As respects question (1), I do not derive much assistance from the facts of the rag sorting and seed cases, such as *Kaye v. Burrows* (1), and *Haines v. Eastern Counties Farmers' Co-Operative Association, Limited* (2). These decisions certainly show that for the purpose of ascertaining whether particular premises are used as a factory the expression " any article " may include bulk and is not necessarily restricted to the single things or items that make up the bulk. But eggs are a very different commodity from those just mentioned, and an answer to the question under discussion must, in my opinion, be sought primarily in the facts and circumstances of the present case rather than by analogy.

The material facts and circumstances here appear to me to support the view that the " article " in question is eggs in bulk. The words " adapting for sale " must be read and applied in the light of the purpose as well as of the nature of the process taking place within the hereditament. There cannot well be an " adapting for " sale " of what is not going to be sold. The Factory Act, 1901, as Scrutton L.J. observes in *Bailey's* case (3) " deals with an ' article ,' which I think means an " article to be sold. A seed is never sold by itself " commercially, and I think the article to be altered or " adapted for sale is the article to be sold, i.e., a bulk, " not an individual item which is never sold by itself." Now, that is very much in point here if the relevant sale is the sort of sale to which the respondent directs his use of these premises. He is a wholesaler. He does not retail eggs. He buys and sells in bulk and not otherwise so far as these premises are concerned. We were reminded during the argument that eggs were generally consumed and often retailed singly, but the sale for consumption is one remove at least from the sale which these premises and the process carried on in

(1) [1931] A.C. 454.
(2) [1931] A.C. 456.
(3) [1931] 1 K.B. 385, 495.

them are designed to render possible. In my opinion, it is the latter sale that must be regarded for the purposes of this question. If the eggs were disposed of in a retail shop attached to the premises the situation might conceivably be different. But as things are, the respondent's eggs are dealt with—to use a neutral term—on these premises in order that they may be sold wholesale, and I can see no reason why a different kind of sale should be substituted in order to ascertain what the " article " being dealt with is. On the facts, therefore, I would conclude that the article here is eggs in bulk and not single eggs.

Such authority as there is on the derating of egg packing stations supports this view. In *Richardson & Son v. Middlesbrough Assessment Committee* (1) the eggs were cleaned at the station, but the facts were otherwise very similar to those in this appeal, and, as I read the judgments of the Divisional Court, the cleaning process cannot be regarded as the basis of the decision. The " article " there was undoubtedly considered to be the eggs in bulk. Lord Goddard C.J. says: " In the present case what is brought in is a great " mass of eggs collected from farmers all over the " district. No purchaser would look at that mass of " eggs because it would be illegal to buy them, just as it " would be illegal for the respondents to sell the eggs " until they had been graded, sorted, cleaned and " marked; but when they have been arranged in " orderly crates in their different classes—and there " are at least five different classes—they can be, and are, " readily sold. (2)" And Atkinson J. adds: " I agree. " The question is whether the process carried on in this " factory was one of the adapting for sale of any " article. The article must not be regarded as an egg; " what was being dealt with were crates of eggs " (3), a passage cited with approval by Jenkins L.J. in *Cockram v. Tropical Preservation Company Limited* (4). Then, in *Armour & Company Limited v. Commissioner of Valuation for Northern Ireland* (5), the Divisional

(1) [1947] K.B. 958.
(2) Ibid. 962.
(3) Ibid. 963.
(4) [1951] 2 K.B. 827, 834.
(5) (1951) 86 I.L.T.R. 3.

Court here (Sheil and Curran JJ.), following *Richardson's* case (1), held, on facts indistinguishable as respects the eggs dealt with on the premises, that there was an " adapting for sale " and seems undoubtedly to have accepted the view that the " article " to be considered was eggs in bulk.

On this conclusion question (2) arises. Has there been an " adapting for sale " of the eggs in bulk ? I must confess that I can see no reason why, speaking generally, the process of sorting and segregating a mass of items that together constitute an " article " should not be capable of being an " adapting for sale," even though the items all remain physically unaltered when the process is completed. An example referred to in the course of the debate may serve to illustrate how difficult it is to resist this as a general proposition. The article is a quantity of crushed stone, the process the familiar one of putting the numerous fragments through a series of graduated sieves or riddles so that the mass is ordered and segregated into saleable parcels graded according to the size of the pieces. Nothing is done to alter the individual stones, but I think there can be no doubt that such a process would be commonly regarded as an " adapting for sale " as that expression is ordinarily used and understood. It is not, of course, every process of sorting or segregation that can be so reckoned. As Scrutton L.J. said in *Bailey's* case (2) :

" In my view the question whether sorting or separa-
" tion of an article to be sold from a bulk is an
" adapting for sale depends on the facts of each par-
" ticular case, and cannot be determined simply by
" saying : ' no sorting is adaptation for sale.' The
" original bulk may be such that it cannot be sold
" either legally, as in mixed seeds, or commercially,
" because an unsorted bulk is not wanted, and the
" process of sorting may be so complicated and
" mechanical as to deserve the title of a manufacturing
" process, i.e., of ' adapting for sale.' On the other
" hand, the bulk and the article to be sold may be so
" similar and of such a nature, such as taking a quarter

(1) [1947] K.B. 958. (2) [1931] 1 K.B. 385, 494.

" of a pound of bulls-eyes out of a bulk in a bottle, that " the separation or sorting may well be regarded as an " entirely minor incident of the sale or distribution." The question is one of degree to be answered according to the facts of each instance. But the principle is, in my opinion, clear. The process of sorting items in bulk may be an " adapting for sale." This is entirely consistent with the dictum of Lord Dunedin already quoted, as is indeed made explicit in his opinion in the *Kaye* (1) and *Hines* (2) cases.

It remains to consider whether the facts of this appeal warrant the view that the process described was an " adapting for sale " of the eggs in bulk. The relevant finding of the learned Recorder, as set forth in his judgment, reads as follows—" So far as the question " for decision is one of fact I hold that the operations " carried on in the hereditament are an adaptation for " sale of the eggs and that such is the purpose for which " the hereditament is primarily occupied and used." It would, I think, be enough to say that there was evidence to support this as a finding on the question of degree to which I have referred. But I feel the facts justify me in going further and saying that this was the proper conclusion. To describe the activities carried on upon the respondent's premises as a mere prelude to distribution would, in my opinion, be to part company with the realities of the situation. The process was not a simple rearrangement or separation of items for sale. It was a process calling for skill and experience and the use of special machinery, all of which were, first and last, directed to transforming the eggs delivered into a saleable commodity. Once the conclusion has been reached that the " article " is the bulk and not the single item, the way seems clear for saying, as Lord Dunedin said in the rag and seed cases (3) " the " finished article is different from the article in bulk " which enters the hereditament, and that is, in my " opinion, an adaptation for sale."

For these reasons, I would affirm the decision of the Divisional Court and dismiss this appeal.

(1) [1931] A.C. 454, 477.
(2) [1931] A.C. 456, 477.
(3) [1931] A.C. at 484.

PORTER L.J.: I have had the advantage of reading, and entirely concur with the judgment of the Lord Chief Justice.

BLACK L.J.: The question for decision on this appeal is whether the operations described in the case stated constitute an "adapting for sale" of eggs within the meaning of that phrase as used in section 149 of the Factory and Workshop Act, 1901. If I confess that I have found this problem a difficult and perplexing one I can cite in my defence the high authority of Lord Dunedin, who roundly says in *Union Cold Storage Company, Ltd. v. Bancroft* (1), that it may be difficult or impossible to identify the essential quality of the operation described in section 149.

The operations carried on in the respondent's premises consist of (*a*) the testing of eggs by "candling," (*b*) the weighing and stamping of such of the eggs as are found to be of first quality, and (*c*) the separation of these eggs into four classes according to weight, and the packing of these eggs, when so graded, into boxes containing thirty dozen each for shipment or delivery.

From the decision of the House of Lords in *Grove v. Lloyd's British Testing Company, Ltd.* (2) it seems clear that neither the process of testing or "candling" the eggs, nor the subsequent stamping of them, can be regarded as an adapting of the eggs for sale within section 149. The question for the decision of the court in the present case accordingly reduces itself to whether the process of grading and packing the eggs according to weight, as described in the Case Stated, can be held to be an adapting for sale within the section. On the one hand, the Commissioner of Valuation founds himself on the dictum of Lord Dunedin in *Lloyd's* case (3) that "adapting for sale" points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before. He contends that as

(1) [1931] A.C. 447, 493.
(2) [1931] A.C. 450, 466.
(3) [1931] A.C. 450, 467.

the individual eggs which pass through the respondent's premises are not treated in any way, but emerge from the premises in exactly the same condition in which they enter them, they cannot be said to have undergone any adapting. The respondent, on the other hand, contends that the separation of the eggs into grades which makes them saleable is sufficient to constitute an adapting for sale, and especially as under the provisions of the Marketing of Eggs Rules, 1938 (S.R. & O. (N.I.) 1938, No. 10), a wholesale dealer in eggs holding a Class A licence such as the respondent is not entitled to sell eggs unless they have first been tested and graded.

The point has already been before a Divisional Court in England in *A. Richardson & Son v. Middlesbrough Borough Assessment Committee* (1), and a Divisional Court in Northern Ireland in *Armour & Co. Ltd. v. The Commissioner of Valuation for Northern Ireland* (2). In each of these two cases it was held that the processes carried on in an egg packing station such as the respondent's, constituted an adapting for sale of the eggs. No doubt in *Richardson's* case (1) many of the eggs brought into the premises were cleaned there, a process forbidden by the Northern Ireland Regulations, but the decision of the court did not turn upon this. The present case is, in effect, an appeal against the decision in *Armour's case* (2), and the Commissioner of Valuation seeks to have it held by this court that *Armour's* case (2) and *Richardson's* case (1) were wrongly decided.

As the individual eggs leave the respondent's premises in precisely the same condition in which they enter them, the case appears to me to be a pure "sorting" one and to raise the question whether the mere sorting of articles in order to render them saleable can constitute an adapting for sale of the articles. I do not derive much assistance from the rags case,

(1) [1947] K.B. 958. (2) (1951) 86 I.L.T.R. 3.

*Kaye v. Burrows* (1) or from the seeds case, *Hines v. Eastern Counties Farmers' Co-Operative Association Ltd.* (2), inasmuch as neither of those cases is by any means a pure sorting case. In the former case the merchant carried out a variety of processes in ripping, clipping, and otherwise disintegrating the old garments and other rags brought into his premises. According to the report 95 per cent. of the total quantity of rags received by him appear to have been so dealt with. In the latter case various, and apparently elaborate, mechanical processes were carried out for cleaning and purifying the different types of seeds dealt in by the merchants, and, in addition, certain varieties of seeds were mechanically decorticated. While the dictum of Lord Dunedin in *Lloyd's* case (3) upon which the Commissioner so strongly relies, would suggest that an operation of pure sorting could not be regarded as an adapting for sale within section 149, on the other hand, in his judgment in the Court of Appeal in the same group of cases (4), Scrutton L.J. expresses the view that the question whether sorting is an adapting for sale depends on the facts of each case and cannot be determined simply by saying "no sorting is adaptation for sale," and, after saying that where substantial changes are made in the article, as in the seed cleaning case, he saw no difficulty in holding the process to be adapting for sale, he continues: "But in view of the fact that 'adapting for sale' is a separate head from altering"—i.e. in section 149—"I see no reason for requiring alteration "of substance to make adapting for sale. If this were "necessary there would be no need to insert adapting "for sale. Where the process of separation or sorting "is complicated and substantial, again I think there "is adapting for sale."

I do not think that much assistance is to be derived from subsequent decisions. In the absence of any clear criterion to identify the essential quality of the operation described in section 149, different minds will

(1) [1931] A.C. 454, 477.
(2) [1931] A.C. 456, 480.
(3) [1931] A.C. 450, 467.
(4) [1931] 1 K.B. at 494.

be apt to take different views of the same process. Thus, in *MacDuff-Duncan Ltd. v. Perthshire Assessor* (1), Lord Russell and Lord Keith inclined to the view that the operation of chicken sexing might, perhaps, be regarded as "adapting for sale," while Lord Jamieson was strongly of the opposite opinion. In *Jobling v. Sunderland Assessment Committee* (2), the process was a simple one of sorting, storing and packing articles of glassware delivered from the appellants' works to their store. Lord Greene M.R. described it as a complete misuse of language to say that that amounted to adapting the articles for sale. In the more recent case of *Davis Cohen & Sons, Ltd. v. Hall* (3) the English Court of Appeal held that the necessity for a much more elaborate amount of sorting of a very miscellaneous assortment of articles did not amount to an adapting for sale. One point on which Evershed M.R. relied was that there was nothing which could be fairly called any kind of industrial process with regard to the goods. He continued: "I do not "wish by that phrase to suggest a necessary test to "be used in other cases, but it seems to me to be a brief "way of emphasising, not inaccurately, the distinction "that I draw between this case and *Hines* (*Ipswich "Revenue Officer*) *v. Eastern Counties Farmers' Co-"Operative Assocn. Ltd.* (4) and *Kaye* (*Dewsbury "Revenue Officer*) *v. Burrows & Dewsbury Assessment "Committee* (5)." At the end of p. 161 of the report Evershed M.R. observes that it is unnecessary to say anything about the correctness or otherwise of *Richardson's* case (6), and says that that case depended on the conclusions of fact which were arrived at in regard to it. This observation is not unnaturally urged as throwing doubt upon the soundness of the decision in *Richardson's* case (6). But in *Cockram v. Tropical Preservation Co. Ltd* (7), Jenkins L.J., quotes the decision in *Richardson's* case (6) and obviously treats the case as having been correctly decided. In taking this view

(1) [1947] S.C. 346.
(2) [1944] 1 All E.R. 500.
(3) [1952] 1 All E.R. 157, 161.
(4) [1931] A.C. 456.
(5) [1931] A.C. 454.
(6) [1947] K.B. 958.
(7) [1951] 2 K.B. 827, 840.

we may assume that the learned Lord Justice was not oblivious of Lord Dunedin's dictum in *Lloyd's* case (1), which, as appears from Birkett L.J.'s judgment, had been continually reiterated during the argument.

I was much impressed with the example referred to in the argument of the familar type of machine consisting of a long revolving cylinder pierced with different sized holes at different stages by means of which broken stones are sorted into various sizes ranging from those which could pass only through a ring several inches in diameter down to what are usually classified as screenings. The function of this machine is to separate stones as they come from the stone crusher into different sizes to meet the requirements of different purchasers. It seems to me that it would be difficult to say that this process did not constitute an adapting for sale. Perhaps the fact that a mechanical or industrial process is employed may make it easier to classify a sorting of articles into different sizes as an adaptation for sale. This would be in line with Scrutton L.J.'s view that there is an adapting for sale where the process of separation or sorting is complicated and substantial. In the present case, the separation of the eggs into different classes according to weight is carried out by mechanical grading machines. This, when coupled with the fact that under the Marketing of Eggs Rules the respondent would not be entitled to sell the eggs unless they were graded, may, I think, be sufficient to justify the finding that the processes carried on upon the respondent's premises constitute an adapting for sale within the meaning of section 149 of the Act of 1901.

*Appeal dismissed.*

Solicitor for the appellant : *F. C. MacNeice.*

Solicitor for the respondent : *J. C. Taylor & Co.*

S.M.M.

(1) [1931] A.C. 450.

## PETTY v. BIGGERSTAFF (1).

*Customs—Charge of dealing with uncustomed goods—No evidence of origin of goods or of unlawful importation—Onus of proof—Customs Consolidation Act*, 1876 (39 & 40 *Vict.*, *c.* 36) *ss*, 186, 259.

Where a defendant is charged with being knowingly concerned in dealing with goods contrary to s. 186 of the Customs Consolidation Act, 1876, the complainant must prove that the defendant was knowingly concerned in dealing with the goods in question, but thereafter by virtue of s. 259 of that Act the onus is on the defendant to show that the duty in respect of the goods had been paid, or that the goods were lawfully imported, or that they were not brought from a place outside the United Kingdom.

B was charged on a summons which alleged that he had been knowingly concerned in dealing with a Ford motor car in contravention of s. 186 of the Act of 1876. A second summons charged a similar offence in relation to an Austin motor car. At the hearing no evidence was adduced by B who contended that the onus was on the complainant to prove that duty was due on the cars, or that they had been unlawfully imported, or that they were brought from a place outside the United Kingdom.

*Held*, by the Court of Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ.), (i) that on the summons relating to the Ford car the evidence for the complainant was insufficient to establish that B was concerned in dealing with the car and accordingly no case was proved which would bring s. 259 into operation; (ii) that on the summons relating to the Austin car there was evidence which established that B was concerned in dealing with the car, and as B had contended that no offence was committed, a "dispute" existed for the purpose of s. 259 of the Act, and accordingly that section operated to cast upon the defendant the onus of proof on the issues referred to in the section.

*R.* (*McBirney*) *v. Armagh JJ.* [1934] N.I. 212 and *R* (*Magee*) *v. Down JJ.* [1935] N.I. 51 overruled.

CASES STATED by the County Court Judge of Down.

The defendant, who was respondent in this appeal, was summoned at Newry Petty Sessions to answer two complaints; one that he had been knowingly concerned in dealing with a Ford 8 h.p. motor car, registered number EZ 2181, with intent to defraud Her Majesty of the duties due thereon contrary to section 186 of the Customs Consolidation Act, 1876; and the other

(1) In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.: May 5, 1953.

that he had been guilty of a similar offence in respect of an Austin 10 h.p. motor car, registered number AWS 5. Both summonses were dismissed by the resident magistrate and the complainant appealed in each case to quarter sessions. At the hearing of the appeals the complainant sought to establish in each case that the defendant had acquired a motor car properly registered in Northern Ireland, had transferred the number plates and registration book of that car to a similar car which had been disguised to correspond with the particulars in the registration book, and had sold the disguised car as a car which had been properly registered in Northern Ireland.

In the case of the Ford car it was shown that the defendant bought a Ford car EZ 2181 which was properly registered in Northern Ireland and had received the registration book thereof, that subsequently the customs authorities seized a different though similar car which bore the same number but which had never been properly registered in Northern Ireland and that the person in possession of the seized car had possession of the registration book which had been in the defendant's possession.

In the case of the Austin car the evidence was similar, but it was proved in addition that the car which was seized had been in the defendant's possession.

In each case it was established that the car, if imported, was liable to duty and purchase tax.

The defendant adduced no evidence and it was contended on behalf of the complainant that by virtue of section 259 of the Customs Consolidation Act, 1876, the onus was cast upon the defendant to prove that the cars in question had not been imported, or alternatively that no duty was payable in respect of them. For the defendant it was submitted that the onus of proof of these matters was on the complainant.

The county court judge decided in favour of the defendant and dismissed both summonses, but at the request of the complainant stated these two cases for

the opinion of the Supreme Court as to whether he was correct in law in so doing.

*Nicholson Q.C.* and *Brown* for the appellant.

The respondent did not appear and was not represented.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J.: These two appeals have for convenience been heard together because each raises a question as to the applicability of section 259 of the Customs Consolidation Act, 1876; but while that is so, the facts of the cases differ in an important respect, and it will be necessary to deal with each separately.

First, however, it will be convenient to make a preliminary observation as to s. 259 of the 1876 Act (1).

[His Lordship read the section and continued]:

Now I have no doubt that this section is capable of applying to cases concerning traffic across the land boundary between Northern Ireland and the Irish Republic, but it seems equally clear that before its provisions can be brought into operation there must be some evidence connecting the defendant and the goods in respect of which the proceedings are brought. I cannot construe section 259 as intended to place the burden of proof upon a defendant merely because he is named as such in the proceedings and irrespective of whether there is any evidence to associate him with the goods in question.

This consideration suffices to dispose of the appeal relating to the Ford car. In that case, the informa-

(1) Customs Consolidation Act, 1876, s. 259: "If in any prosecution in respect of any goods "seized for non-payment of duties, "or any other cause of forfeiture, "or for the recovery of any penalty "or penalties under the Customs "Acts, any dispute shall arise "whether the duties of Customs "have been paid in respect of such "goods, or whether the same shall "have been lawfully imported or "lawfully unshipped, or concerning "the place from whence such goods "were brought, then and in every "such case the proof thereof shall "be on the defendant in such "prosecution. . . ."

tion upon which the summons is based alleged that the defendant had been knowingly concerned in dealing with a Ford car, No. EZ 2181, with intent to defraud Her Majesty of the duties payable thereon in contravention of section 186 of the Act of 1876. The learned county court judge in the case stated sets out the facts which were proved before him, but those facts, to my mind, do not go the length of showing any material connection between the defendant and the car in respect of which the proceedings were brought. The matter is complicated by reason of the fact that two cars were mentioned in the evidence, a genuine Ford and a spurious Ford—spurious in the sense that it bore the number plates of the genuine car. The genuine Ford was associated with the defendant, but the car to which the proceedings related was not. In this state of affairs no case was proved against the defendant which would bring section 259 into operation. In these circumstances the proper course for this court, in my opinion, is to decline to answer the question submitted on the ground that, on the facts as found, section 259 had no application, and to affirm the dismissal of the charge.

The second case concerned an Austin car, manufactured in the year 1939. Here the facts found by the learned county court judge were materially different in that there was the clearest evidence associating the defendant with the vehicle which was the subject of the proceedings. The summons, which was issued on April 7, 1952, charged the defendant with being knowingly concerned in dealing with this Austin car with intent to defraud Her Majesty of the duties payable thereon, contrary to section 186 of the 1876 Act, and the question whether, having regard to the provisions of section 259 of the Act of 1876, the onus of proof was upon him clearly arises and must now be considered.

While the evidence adduced before the county court judge plainly associated the defendant with this vehicle, there was no evidence that it came from the Irish Republic, or that it had been unlawfully imported or that any duty was due in respect of it. The com-

plainant, however, contended that the onus was on the defendant to prove either that the duty on the car had been paid or that it had not been unlawfully imported, or had not been brought across the border. On this, I think both the resident magistrate and the county court judge were obliged to decide against the complainant because they were bound by two decisions of the High Court : *R.* (*McBirney*) *v. Armagh Justices* (1) and *R.* (*Magee*) *v. Down Justices* (2). The first of these cases affords authority for the proposition that in a customs case the onus of proving that there has been an illegal importation of the goods lies on the Commissioners. In neither of the cases cited, however, do the judgments, which were delivered by Moore L.C.J., refer to the effect of section 259 ; there is nothing in them to indicate the opinion of the court as to the applicability of that section, and they therefore provide no guidance for this court in the present case on that question.

Subject to the requirement already noticed, section 259 comes into operation on the fulfilment of two conditions. The first of these is that there must be a prosecution in respect of goods seized for non-payment of duty or other cause of forfeiture, or for the recovery of a penalty under the Customs Acts. Here, the proceedings were brought for the recovery of a penalty under the Customs Acts and this condition is therefore satisfied : see *R. v. Fitzpatrick* (3).

The second condition to be fulfilled before the section operates is that in such a prosecution there must be a dispute as to whether duty has been paid on the goods, or as to whether the goods have been unlawfully imported, or as to the place from whence the goods were brought. Now it is to be observed that, although the respondent offered no evidence, he appeared by counsel and advanced the contention that no offence under section 186 could be established against him until it was proved that the vehicle in question had been unlawfully imported or that duty was payable

(1) [1934] N.I. 212.
(2) [1935] N.I. 51.
(3) [1948] 2 K.B. 203.

in respect of it or that it had been brought across the Border.

These matters were all relevant to the charge and having thus been put in issue by the respondent it seems to me that a " dispute " had arisen regarding them within the meaning of section 259. Reading the word in its ordinary sense and giving due weight to the obvious purpose of the section, and, in particular, to the words " . . . then and in every such case " the proof thereof shall be on the defendant in such " prosecution," I can see no escape from this conclusion and am therefore of opinion that the second condition was also satisfied.

This being the position the result in law was that section 259 operated against the respondent and so as to put upon him the onus of proof on the issues mentioned.

I therefore hold that the learned county court judge was wrong in law in ruling as he did. The question submitted must be answered in the negative and the case remitted to be dealt with according to law.

PORTER L.J.: I agree, and have little to add to what the Lord Chief Justice has said. I think, however, that it was unfortunate that no one has appeared before us to represent the respondent, because it seems to me that our decision may have a far-reaching effect in regard to cases dealing with the Customs Acts, especially in view of the earlier decisions, *R. (McBirney) v. Armagh JJ.* (1), and *R. (Magee) v. Down JJ.* (2). In the former case the defendants were charged with an attempted evasion of duty by knowingly harbouring cattle imported from the Irish Free State. False statements had been made by the defendants, but there was no evidence that the cattle had been imported from the Free State. The justices convicted, holding that there was a dispute and that the defendants had not discharged the onus of proving that the cattle had not been smuggled. I do not know whether section 259 was discussed at the hearing of the case stated, although it appears that counsel who appeared for the respondents referred to the

(1) [1934] N.I. 212. (2) [1935] N.I. 51.

section in argument and contended that it should be read together with section 225. The Lord Chief Justice in his judgment does not mention section 259 and the judgment is based solely on the finding that there was no evidence that the cattle had been smuggled. It seems to me therefore that the Lord Chief Justice overlooked section 259. *Magee's* case (1) was tried upon an application to make absolute a conditional order for certiorari and the sole question at issue was whether the justices had jurisdiction to convict in the absence of any evidence that the cattle in question had been unlawfully imported. The justices who were satisfied from the description of the cattle and from the contradictory statements made by the Magees, held that a prima facie case had been made out, and that the onus which was cast upon the defendants had not been discharged. One would have thought that in those circumstances there would have been some reference to the onus of proof and the applicability of section 259, but the argument and the judgment appear to have turned on the question as to whether the justices were entitled to take into account the collateral facts to give themselves jurisdiction in the case.

These decisions, it seems to me, give us no assistance as to the effect of section 259. That section seems to me to apply in almost every customs case, for there must be few cases which can come before the court in which some of the matters referred to in section 259 do not arise, and indeed I can hardly conceive of such a case.

There may be some difficulty in deciding what does constitute a dispute in some cases. Does a dispute arise in every case where there is a summons issued and the defendant appears and says nothing? It seems to me that the meaning of the words regarding the onus of proof imposed by the section is quite clear and I cannot see that they bear any meaning other

(1) [1935] N.I. 51.

than that which the Lord Chief Justice has attributed to them.

I agree with the order proposed by the Lord Chief Justice in each of the two cases.

BLACK L.J. : I concur and I am in agreement with the form of the order proposed in each of the two cases. In each of the summonses a charge was made against the defendant that he was knowingly concerned in dealing with uncustomed goods with intent to evade the duties payable thereon. There are three circumstances which must exist in order to constitute such an offence ; first that the defendant was concerned in dealing with the goods, second that he was knowingly concerned, and third that the goods were uncustomed goods. As to the defendant being concerned in dealing with the goods, that is a question of fact, and the onus lies upon the prosecutor to establish this fact. As to " knowingly " it has been decided by a number of decisions of the King's Bench Division that the onus lies upon the prosecutor to prove mens rea. It has not been canvassed before us whether those decisions are right or wrong, and I take it therefore that it is accepted that they remain authoritative. As to the remaining element, that the goods must be uncustomed goods, I am of opinion that section 259 fairly and squarely places the onus upon the defendant instead of upon the prosecutor. I cannot read the section otherwise than as imposing upon the defendant the onus of proving that the goods are not uncustomed goods.

As regards the Austin car, the question must be answered that the learned county court judge was wrong in deciding as he did, although he was bound to do so in view of the decisions in *McBirney's* case (1) and *Magee's* case (2).

With regard to the Ford car the evidence, in my opinion, fell short of establishing that the defendant

(1) [1934] N.I. 212. (2) [1935] N.I. 51.

had been concerned in dealing with the goods which were the subject matter of that charge. I agree with the Lord Chief Justice that in this case we should decline to answer the question asked in the case stated and that we should affirm that part of the order of the county court judge which ordered the summons to be dismissed.

*Orders accordingly.*

Solicitor for the appellant : *Chief Crown Solicitor.*

J P.

## REGINA (DORIS) v. MINISTRY OF HEALTH & LOCAL GOVERNMENT AND THE NORTHERN IRELAND HEALTH SERVICES BOARD (1).

*Health Services—Dental Services—Dentists' terms of service—Health Services Act (Northern Ireland), 1948 (11 & 12 Geo. 6, c. 3), ss. 5, 6, 11, 12, 80—Health Services (General Dental Services) Regulations (Northern Ireland), 1948 (S.R. & O., 1948, No. 157) —Health Services (Services Committee) Regulations (Northern Ireland), 1948 (S.R. & O. 1948, No. 164).*

*Certiorari—Cases in which granted—Prosecutor precluded by conduct from obtaining an order.*

A dental practitioner undertook to provide treatment under the Health Services Act (Northern Ireland), 1948, by entering into an agreement with the Health Services Board in the form provided in a schedule to the Health Services (General Dental Services) Regulations (Northern Ireland), 1948, (hereinafter referred to as "the General Dental Services Regulations"). This form provides, inter alia, that the provisions of the Health Services (Services Committee) Regulations (Northern Ireland), 1948, (hereinafter referred to as "the Services Committee Regulations") affecting the rights, duties and obligations of dentists shall be deemed to form part of the dentists' terms of service. The Services Committee Regulations were made one week after the making of the General Dental Services Regulations.

In 1951 the Dental Services Committee, a body established under the Services Committee Regulations, investigated complaints made by the Health Services Board that the dental practitioner had been guilty of breaches of the terms of service in respect of the treatment of four patients. The practitioner attended the investigation and was represented by a solicitor. The Committee found the complaints proved in respect of three of the patients and recommended a deduction of ten guineas from the practitioner's remuneration in respect of each of these cases. The Board accepted the Committee's recommendation and the practitioner was notified of this decision and also of her right to appeal against it to the Ministry.

The practitioner lodged an appeal with the Ministry and this appeal was heard by persons appointed by the Ministry to act as an appeal committee. The appeal committee recommended that the decision of the Board should be affirmed with a variation in the amount of deduction in one of the cases. The Ministry having adopted the report of the appeal committee the practitioner challenged the right of the Board and the Ministry to make any deductions from her remuneration and applied for an order of

(1) In the Queen's Bench Division (Crown Side) before Porter L.J. and Sheil J., Feb. 9, 10, 11 ; Mar. 31, 1953.

certiorari to quash the findings and report of the appeal committee and the decision of the Ministry thereon.

*Held*, (1) that certiorari will lie to review decisions of the Dental Services Committee and of the Ministry's appeal committee notwithstanding that those bodies exercise a jurisdiction arising out of a contract between a practitioner and the Health Services Board; (ii) that the practitioner was bound by the Services Committee Regulations, notwithstanding that these regulations were not in existence when the General Dental Services Regulations were made, if she entered into the agreement with the Health Services Board after the date of the making of the Services Committee Regulations.

*Semble* that she would not be bound if she had entered into the agreement before the Services Committee Regulations were made.

(iii) that the provision in the Services Committee Regulations establishing a tribunal to investigate complaints with an appeal to persons appointed by the Ministry was not ultra vires.

(iv) that as the practitioner had appeared before the Services Committee and had appealed to the Ministry without objecting at any time to the jurisdiction she was now precluded from challenging the jurisdiction of these bodies in an application for certiorari.

MOTION to make absolute a conditional order of certiorari.

By section 11 of the Health Services Act (Northern Ireland), 1948, the Northern Ireland Health Services Board is required to make arrangements with dentists for the provision of dental services in accordance with regulations to be made under the Act. The arrangements are prescribed in the Health Services (General Dental Services) Regulations (Northern Ireland), 1948, and the terms of service for dentists are set out in the First Schedule thereof. These terms include a provision that any of the provisions of the Health Services (Services Committee) Regulations (Northern Ireland), 1948, affecting the rights, duties and obligations of dentists shall be deemed to form part of the dentists' terms of service. The General Dental Services Regulations are dated June 21, 1948, and the Services Committee Regulations are dated June 28, 1948.

The prosecutrix, a dental practitioner, having agreed to provide a service of dental treatment under the Act, made a contract with the Board in the prescribed form. In June 1951 the Board made complaints to the Dental Services Committee, a committee set up by the

Board pursuant to the Services Committee Regulations, that the prosecutrix had been guilty of breaches of her terms of service in respect of the treatment of four of her patients. The Committee heard these complaints, and at the hearing the prosecutrix, who was represented by a solicitor, appeared and gave evidence. The Committee decided that breaches of the terms of service had been proved in three of the cases and they recommended a deduction from the remuneration due to the prosecutrix of ten guineas in respect of each of the three cases.

On July 26, 1951, the Board informed the prosecutrix in writing that the Board had decided to adopt the recommendation of the Committee and enclosed a copy of the Committee's report. The letter also informed the prosecutrix that she might appeal to the Ministry of Health and Local Government within one month. Her solicitor thereupon wrote to the Ministry applying for an extension of the time limited for appeal and this application was granted.

On September 28, 1951, notice of appeal was lodged and the Ministry, in accordance with the provisions of the Services Committee Regulations, appointed persons to hear the appeal. The appeal was heard on November 8, 1951, and on January 2, 1952, the Ministry informed the prosecutrix that the persons appointed to hear the appeal had reported to the Ministry and that the Ministry had considered their report and had decided that the breaches of the terms of service had been proved in all three cases, but that in one of the cases the breach was less serious and accordingly in that case the deduction would be reduced from ten guineas to five guineas.

Thereafter the prosecutrix applied for and obtained a conditional order of certiorari to have the decisions of the appeal committee and the Ministry removed into the High Court for the purpose of being quashed.

*McSparran Q.C.*, *McVeigh Q.C.* and *McGonigal* for the prosecutrix contended that the Services Committee Regulations were ultra vires in so far as they purported to empower the Board and the Ministry

to make deductions from the remuneration of practitioners; that no part of those regulations were applicable to dental practitioners because they were not in existence at the time when terms of service for dentists were prescribed; and that the purported decision of the Ministry was invalid because it failed to specify the grounds of the decision as required by the Services Committee Regulations.

*Nicholson Q.C.*, *Harrison Q.C.* and *Lowry* for the Ministry and *Patton Q.C.* and *Gibson* for the Board contended that the decisions impugned were decisions of domestic tribunals whose jurisdiction was based on contract, and that therefore the decisions were not subject to review by certiorari.

*Cur. adv. vult.*

PORTER L.J.: [delivering the judgment of the court]: This was an application by the prosecutrix, Kathleen J. Doris, for an order to make absolute, notwithstanding the cause shown, the conditional order of certiorari directed to the Ministry of Health and Local Government and the Northern Ireland General Health Services Board, to remove into the Queen's Bench Division for the purpose of being quashed, the findings and report of the appeal committee and the decision of the Ministry confirming the said report, and ordering the deduction of twenty-five guineas from her remuneration in respect of three breaches of the terms of service as a dental practitioner included in the dental list of the Northern Ireland General Health Services Board.

The grounds on which the conditional order was granted were as follows: (1) that the appointment of persons appointed by the Ministry to hear the said appeal and to report on the matters complained of was made without and in excess of jurisdiction and was ultra vires the powers of the Ministry; (2) that the said persons had no jurisdiction to entertain or to

report on the matters complained of, and that in purporting to do so they acted without and in excess of jurisdiction; (3) that the decision of the Board and of the Ministry was made without and in excess of jurisdiction, or alternatively, that the decision of the Ministry is bad on its face and void as failing to give the reasons therefor as required by paragraph 5 of regulation 9 of the Health Services (Services Committee) Regulations (Northern Ireland), 1948, to which we shall refer hereafter as the Services Committee Regulations.

The Health Services Act (Northern Ireland), 1948, provides for the establishment of a comprehensive health service for Northern Ireland. The first section enacts that it shall be the duty of the Ministry of Health and Local Government to promote the provision in Northern Ireland of services designed to secure improvement in the physical and mental health of the people, the prevention, diagnosis and treatment of illness and the ascertainment and prevention of mental deficiency, and the care, supervision, training and occupation of mental defectives, and to take such steps as are necessary to secure the effective provision of such services. The services provided under the Act are free of charge except where any provision of the Act expressly provides for the making and recovery of charges.

Under section 4 a Board called the Northern Ireland General Health Services Board was constituted in accordance with the First Schedule to the Act, and the section provides that it shall be the duty of the Board subject to regulations to perform the functions conferred on them by the Act, and such other functions as may for the purposes of the Act from time to time be prescribed or assigned to them by the Ministry.

With regard to the provision of General Dental Services section 11 enacts that it shall be the duty of the Board, in accordance with regulations, to make arrangements with dental practitioners under which any person for whom a dental practitioner undertakes, in accordance with the arrangements, to provide dental

treatment and appliances shall receive such treatment and appliances, and also that regulations may make provisions as to the arrangements to be made with dental practitioners and shall include provision (*a*) for the preparation publication and maintenance of lists of dental practitioners who undertake to provide general dental services; (*b*) for conferring a right on any dental practitioner resident in Northern Ireland who wishes to be included in any such list to be so included; (*c*) for conferring a right on any person to choose in accordance with the prescribed procedure the dental practitioner from whom he is to receive general dental services subject to the consent of the practitioner so chosen ..... ; and (*g*) for the remuneration of dental practitioners providing general dental services.

Section 80 empowered the Ministry to make regulations (inter alia) for prescribing anything which was necessary or expedient for the purpose of giving due effect to the provisions of the Act.

The general arrangements for dentists are contained in the Health Services (General Dental Services) Regulations (Northern Ireland), 1948, to which I will refer as the General Dental Services Regulations. Regulation 3 provides that the arrangements which the Board are required to make with dentists for the provision of general dental services otherwise than at a health centre shall incorporate the terms of service contained in the First Schedule to these Regulations. Paragraph 2 of this schedule is as follows: "Any "provisions of the Act, the Regulations and the "Health Services (Services Committee) Regulations "(Northern Ireland), 1948, affecting the rights, duties "and obligations of dentists shall be deemed to form "part of these terms of service."

"The Regulations" referred to are the General Dental Services Regulations which were made on June 21, 1948. The Services Committee Regulations were made on June 28, 1948.

Paragraph 3 (1) of the First Schedule to General Dental Services Regulations relating to the standard of service is as follows: "In providing general dental

"services under these Regulations a dentist shall "employ a proper degree of skill and attention and "shall, subject to the provisions of paragraph 8 hereof, "provide the treatment necessary to secure dental "fitness that the person concerned is willing to undergo, "and shall satisfactorily complete that treatment."

Paragraph 8 relates to the inability or unwillingness of the dentist to complete the treatment and need not be further referred to.

By paragraph 5 the dentist is required to keep records of treatment in the prescribed form or in a form substantially the same, and when required to do so to produce such records to the Board, the Committee or a dental officer.

Paragraph 6 (1) provides that a dentist shall be entitled to be paid such fees and other remuneration in respect of any treatment which he is required to give under these terms of service as the Ministry may from time to time determine by Regulations made under section 11 of the Act.

Paragraph 7 relates to the preparation and submission of estimates.

7 (1) is as follows: "In accepting an application "for treatment, the dentist shall (*a*) examine the "applicant and complete Part 7 of the dental estimate "form; (*b*) complete Part 6 of the form and after "detaching it, give it to the applicant; (*c*) set out "in Column 1 of Part 8 of the form the whole of the "treatment necessary in his opinion to render the "person dentally fit and, if the person is not willing "to undergo the whole of such treatment, in Column "II of that Part particulars of such part of that "treatment as the person is willing to undergo."

Paragraph 7 (6) provides that upon completing treatment for a patient a dentist shall give a certificate to that effect in Part 5 of the dental estimate form and shall obtain in Part 4 of that form a certificate from the person concerned that treatment has been completed to the best of his belief. Treatment in so far as it relates to dentures shall not be regarded as complete unless the dentures have been delivered to and remain

in the possession of the person concerned. The dentist shall within one month of the completion of the treatment send to the Committee the dental estimate form.

The Services Committee Regulations contain the provisions for the appointment of the Board, the constitution and the procedure of Services Committees for the investigation of any complaint made by a person against a medical practitioner, a dental practitioner or a chemist : (paragraphs 3, 4 and 5 of the Regulations).

The members of the Dental Services Committee appointed by the Board to investigate the complaints against the prosecutrix consisted of five persons, viz. a chairman and two laymen drawn from the panel of lay persons appointed by the Board, and two members drawn from the panel of dental practitioners.

On June 6, 1951, the Committee met and investigated four complaints made by the Board against the prosecutrix, in which the Board alleged that in four cases she was in breach of her terms of service in that she claimed and received payment of fees in respect of dental treatment certified as completed, but which, in fact, had not been completed.

At the investigation the prosecutrix was represented by her solicitor Mr. E. M. Doris, and gave evidence in each of the four cases.

The Committee held that the first, second and third complaints had been proved, and that there was a breach of the terms of service in each of these cases, but that in the fourth case there was no breach of the terms of service. By a majority vote the Committee recommended that the sum of ten guineas be deducted from the remuneration of the prosecutrix in respect of each of the three complaints.

The two dental members dissented on the ground that such deductions were extremely harsh.

On July 26, 1951, the Board sent a letter to the prosecutrix, with a copy of the report of the Committee on their investigation of the four complaints, and stated that the Board had decided to adopt the recommendations in each case and also informed her that she was entitled to appeal to the Ministry against the

decision of the Board by sending to the Ministry notice of appeal within one month from the date on which she received the notification.

On August 24, 1951, her solicitor wrote to the Ministry and stated that she wished to appeal against the decision of the Board, and he also asked for an extension of time in which to lodge the notice of appeal until October 1, 1951. The Ministry by letter dated August 28, granted an extension of the time limited for lodging notice of appeal until October 1, 1951.

On September 28, 1951, the solicitor served notice of appeal in which the grounds are stated as follows :

1. That no breach of terms of service has been committed either at law or on the merits.
2. That the Services Committee took into account and allowed themselves to be influenced by and based their recommendations upon findings or considerations which are irrelevant for the purpose of arriving at a conclusion in the three particular cases.
3. That the amount proposed to be deducted is manifestly excessive.

The procedure on appeal is set out in regulation 9. Paragraph 5 is as follows : " For the purpose of an oral " hearing the Ministry shall appoint an officer or " officers of the Ministry or some other person or " persons, not exceeding three in number, to hold an " inquiry and to draw up a report. The Ministry after " taking such report into consideration, shall give its " decision, in writing with reasons therefor, which " shall be final and conclusive."

It is further provided that where one of the parties to an appeal is a dental practitioner and the decision of the Board involves a finding that the dental practitioner has failed to exercise reasonable care and skill, the persons appointed to hear the appeal shall include a dental practitioner appointed by the Ministry, after consultation with such organization as may be recognized by the Ministry as representative of the dental profession.

The appeal was heard on November 8, 1951, before

the persons appointed by the Ministry to hear the appeal, and by a letter dated January 2, 1952, the decision of the Ministry was communicated to the solicitor for the prosecutrix. The letter is as follows :

"APPEAL BY MISS K. J. DORIS FROM A DECISION OF THE NORTHERN IRELAND GENERAL HEALTH SERVICES BOARD."

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"Sir,

"I am directed by the Ministry of Health and "Local Government to refer to the appeal to the "Ministry by Miss K. J. Doris against certain "decisions of the Northern Ireland General Health "Services Board."

"The persons appointed by the Ministry in "accordance with Regulation (5) of the Health "Services (Service Committee) Regulations (Northern Ireland) 1948, to hear the appeal have "reported as required by this Regulation, and the "Ministry after careful consideration of the report, "has decided that breaches of the terms of service "were proved in all three cases."

"The Ministry however finds that in the second "case (Patient 327804) the breach was less serious "than those in the first and third cases (Patients "378251 and 364557 respectively) and have accordingly reduced the amount of the deduction in "this case from Ten guineas to Five guineas thus "reducing the total amount to be deducted from "Thirty guineas to Twenty-five guineas. The "Ministry makes no award as to costs. I am to add "that the Northern Ireland General Health Services "Board has been informed of the Ministry's "decision."

"I am, Sir,
Your obedient Servant,
(Signed) D. A. Lyttle
(For Secretary)."

"E. Malachy Doris, Esq.,
Solicitor,
Cookstown."

The solicitor wrote to the Ministry on April 17, 1952, acknowledging the receipt of this letter and stated that his client and her advisers were not satisfied that the Board had any power to make the findings they did make or authorize any deduction, or that the Ministry had any power to do so, and asked to be informed under what authority the findings and the deductions were made.

By letter dated April 21, 1952, the Ministry replied that the findings and the deductions were made in accordance with the terms of the Services Committee Regulations which, as laid down in paragraph 2 of the First Schedule to the General Dental Services Regulations formed part of the terms of service for dentists providing services under Part II of the Health Services Act (Northern Ireland), 1948.

Regulation 6 (*b*) relating to the power of the Board to make a deduction is as follows: "If the Board are "satisfied that a practitioner or chemist has failed or "neglected to comply with the terms of service "applicable to him the Board may recover such amount "as they think fit either by deduction from the "remuneration of the practitioner or chemist or other-"wise, and such sum shall be a debt owing by the "practitioner or chemist to the Board."

One of the grounds on which counsel relied in showing cause against the order was that the tribunal whose decision is impugned was a private or domestic tribunal which derived its jurisdiction from the contract of service with the Board, and that certiorari had never gone to a tribunal of this kind. It is, of course, clear that neither the Ministry nor the Board had any jurisdiction over a dental practitioner until he applied to join the service and was entered in the list of dental practitioners and thus rendered himself amenable to the jurisdiction, but it is a fallacy to say that because the power to investigate and deal with complaints against a practitioner could not be exercised until the practitioner had joined the service, therefore the power was conferred by the contract of service. This is a good example of the post hoc ergo propter hoc kind of

argument. The power to investigate and deal with complaints was conferred by the Statutory Regulations and existed before the prosecutrix joined the service, but the occasion to exercise that power occurred after she had joined the service and a complaint had been made against her.

Mr. Nicholson said that it was the service contract which clothed the Ministry and the Board with the power, but his argument fails to distinguish between the existence of a power and the exercise of that power on a specific occasion. In our opinion certiorari would lie to the Ministry if in the exercise of its powers under the Services Committee Regulations for the investigation of complaints it had acted without or in excess of jurisdiction. In *Reg. (McEvoy) v. Corporation of Dublin* (1) May C.J. said: "It is established that "the writ of certiorari does not lie to remove an "order merely ministerial, such as a warrant, but "lies to remove and adjudicate upon the validity "of acts judicial. In this connection the term "'judicial' does not necessarily mean acts of a "Judge or legal tribunal sitting for the determination "of matters of law, but for the purposes of this "question a judicial act seems to be an act done "by competent authority, upon consideration of "facts and circumstances, and imposing liability "or affecting the rights of others." This statement of the law was approved by Palles C.B. in *R. (Wexford County Council) v. Local Government Board* (2), and in that case after remarking that doubts had been expressed as to whether the Lords of the Treasury would be exempt from certiorari he said (3): "I "cannot admit that the Treasury would be exempt "from certiorari if they exceeded their jurisdiction "in the exercise of a power conferred upon them by "the Local Government Act, and thereby imposed a "liability upon a County Council."

To the same effect is the well-known passage in the

(1) (1878) 2 L.R. Ir. 371, 376-7.
(2) (1902) 2 I.R. 349, 373.
(3) Ibid. 375.

judgment of Atkin L.J. in *Rex v. Electricity Commissioners, ex parte London Electricity Joint Committee Co.* (1). Speaking of the writs of prohibition and certiorari he said: "Wherever any body of persons "having legal authority to determine questions "affecting the rights of subjects, and having the duty "to act judicially, act in excess of their legal authority "they are subject to the controlling jurisdiction of "the King's Bench Division exercised in these writs." The existence of the service agreement in this case cannot in any way affect the jurisdiction which this court possesses to examine, and if necessary to quash, the decisions of the Committee and the Ministry.

Mr. McGonigal argued that the prosecutrix was not bound by the provisions of the Services Committee Regulations nor by the proceedings of the tribunals which purported to be established in pursuance of those Regulations. He said that the General Dental Services Regulations which contained the terms of service was made on June 21, 1948, whereas the Services Committee Regulations were not made until June 28, 1948, and although in paragraph 2 of the terms of service contained in the First Schedule to the General Dental Services Regulations it is stated that any provisions of the Services Committee Regulations, affecting the rights duties and obligations of dentists shall be deemed to form part of these terms of service, no such Regulations were then in existence, and therefore the prosecutrix could not be bound by Regulations which at the time the terms of service were set out were unknown and unascertainable and could not have formed part of the terms of service. There is some plausibility in this argument, and it is difficult to understand why the two Regulations were not made on the same date, but we think the argument must fail for the following reason. The Act was passed on February 4, 1948, and by 1948 S.R. & O. No. 19 it was prescribed that with certain exceptions the Act should come into operation on February 5, 1948. One

(1) [1924] 1 K.B. 171, 205.

of the exceptions which are set out in the Schedule to that Order is: "the day to be appointed under "section 11 being the day as from which the General "Dental Services shall be provided", and by 1948 S.R. & O. No. 144 made on May 31, 1948, July 5, 1948, was prescribed as the appointed day as from which the General Dental Services should be provided. It was not proved nor was it even suggested that she had joined the service in the interim between June 21, and June 28, and if she joined after the latter date, as we think she did, she signed the form of application in which she undertook to provide dental treatment and appliances on the prescribed terms. Inasmuch as the provisions of the Services Committee Regulations relating to the rights duties and obligations of dental practitioners were then in operation in Northern Ireland, those provisions form part of the contract of service, and she is accordingly bound by them.

It was contended that the proceedings before the Services Committee and the appeal tribunal were ultra vires and null and void because there is no provision in the Act which authorizes the Ministry or the Board to set up a committee or a tribunal with power to investigate complaints, impose fines and to deduct or recommend the deduction of such fines from the remuneration of the practitioner.

The Services Committee Regulations purport to be made under sections 5, 6, 11, 12 and 80.

The authority of the Ministry appears to be derived from Section 80 (*f*) which provides that Regulations may be made for prescribing anything which is necessary or expedient for the purpose of giving due effect to the provisions of the Act. The authority of the Board is derived from section 4 of the Act and the Services Committee was appointed by the Board under paragraph 16 of the First Schedule which is as follows: "The Board may appoint a committee for "any such general or special purpose as in the opinion "of the Board would be better regulated and managed "by means of a committee, and may with the approval "of the Ministry and subject to such conditions (if "any) as the Ministry may specify delegate any of

"their functions to a committee so appointed with or "without conditions or restrictions, as they think fit."

It is the duty of the Ministry not only to provide general dental services but also to see that patients receive proper treatment, and the provision which has been made for the investigation of complaints by the Services Committee with an appeal to a person or persons appointed by the Ministry, appears to be reasonably necessary if the Ministry is to perform its statutory functions in an effectual manner.

The Services Committee found that the prosecutrix had failed or neglected to comply with the terms of service, which comprised such of the provisions of the Services Committee Regulations as affected the rights, duties and obligations of dentists. We are satisfied that the Board had power under regulation 6 (*b*) of those Regulations "to recover such amount as they "think fit by deduction from her remuneration."

Mr. McVeigh for the prosecutrix based his argument on regulation 9 (5) of the Services Committee Regulations which provides that the Ministry, after considering the report of the persons appointed to hear the appeal, shall give its decision in writing with reasons therefor which shall be final and conclusive. He said it was vital that the reasons should be set out because that was the only way the matter could be tested by certiorari. How this statement can be consistent with his main contention, which was that the letter of the Ministry dated January 2, 1952, did not set out the reasons, we fail to understand. In our opinion, however, there is no weight in his contention. What was the decision of the Ministry? What were the reasons? The Ministry had carefully considered the report and decided that breaches of the terms of service had been proved in the three cases, one being less serious than the other two, so that the amount to be deducted was reduced from thirty guineas to twenty-five guineas. The reasons set out in the letter are quite plain to an ordinary mind, and I do not see what additional reasons could be given.

Where the grant of a writ of certiorari is discretionary

it is well settled that the conduct of the party aggrieved may be such as to disentitle him to relief. The court will not permit him to impugn the jurisdiction of the inferior tribunal if the objection was not raised in the original proceedings.

In *Reg. v. Surrey Justices* (1) Blackburn J. said: "Where the party grieved has by his conduct pre-"cluded himself from taking an objection, the Court "will not permit him to make it as in *Reg. v. South* "*Holland Drainage Committee* (2)." See also *Reg. v. Sheward* (3) and the judgment of Sir Wilfrid Greene M.R. in *R. v. Stafford Justices* (4).

In *Whelan v. Rex* (5) Whelan was sentenced to death by a court martial, no question having been raised as to the qualification of a member of the court who was required to be certified to be a person of legal knowledge and experience. An application was afterwards made for a writ of certiorari to quash the conviction on the ground that the required certificate had not been produced. The King's Bench Division (Moloney C.J., Gibson and Samuels JJ.) refused the application on the ground that the objection had not been made at the trial, and that there was a general presumption of law that the court was properly constituted.

In *Reg. v. Commissioner of Valuation* (6), Holmes L.J. delivering the judgment of the Court of Appeal said: "I concur with the Chief Baron in holding that where "the right of an individual is prejudiced by an ad-"judication of an inferior tribunal, the writ of "*certiorari* is not a matter of discretion but of right; "but I also agree with him when he says that the right "to question such an adjudication can be lost by the "conduct of the party. I cannot conceive a stronger "case of estoppel by conduct than the present. The "appeal that was taken, so far from raising the point "now relied on, asked for relief that could only be "granted on the assumption that there was jurisdiction "to revise the valuation; and the appellant now

(1) (1870) L.R. 5 Q.B. 466, 473.
(2) (1838) 8 Ad. & E. 429.
(3) (1880) 9 Q.B.D. 741.
(4) [1940] 2 K.B. 33, 44.
(5) [1921] 2 I.R. 310.
(6) [1901] 2 I.R. 215, 230.

" seeks to quash the order of the Court whose assistance " he invoked, because, although it was to a certain " extent in his favour, it was not as favourable as he " expected or desired."

The present case is much stronger. The prosecutrix was represented by her solicitor at the hearing before the Dental Services Committee, and no objection or protest was then made against the jurisdiction. After the solicitor had been notified that the Board had decided to adopt the recommendations of the Committee, he applied to the Ministry for an extension of time in which to lodge notice of appeal. The Ministry granted an extension of the time, and notice of appeal was served against the decision of the Board. At the hearing of the appeal the prosecutrix was again represented by her solicitor, who contested the case on the merits without making any objection or protest against the jurisdiction. She now seeks to quash the order of the tribunal whose assistance she invoked.

In our opinion, she is precluded by her conduct from obtaining the grant and the cause shown should be allowed.

*Conditional order discharged.*

Solicitor for the prosecutrix: *E. M. Doris.*

Solicitor for the Ministry: *Chief Crown Solicitor.*

Solicitors for the Board: *Cleaver, Fulton & Rankin*

J.P.

## PATTERSON v. DONNELL (1).

*Practice—Pleading—Particulars—Personal injuries—Medical examination on defendant's behalf—Visible deformity.*

**In an action for personal injuries the plaintiff, who had averred that he had suffered substantial deformity of the right leg, was medically examined on the defendant's behalf. Subsequent to the examination the plaintiff was served with a notice requiring further and better particulars of the alleged deformity.**

***Held*, that the defendant was not entitled to further particulars of the deformity which should have been readily visible at the medical examination.**

MOTION for an order that the plaintiff make further and better answer to a notice for particulars.

In an action arising out of a collision which occurred on May 29, 1951, between a bicycle ridden by the plaintiff and a motor car driven by the defendant, the plaintiff claimed damages for personal injuries, loss and damage alleged to have been sustained by him and occasioned by the defendant. The statement of claim was delivered on March 19, 1952, and on April 7 the plaintiff was medically examined on behalf of the defendant. On April 18 the defendant delivered his defence together with a notice for further and better particulars to which the plaintiff furnished answers by notice dated May 3.

Among other matters ,the defendant required further and better particulars of " The nature, site and extent " of the deformity of the right leg which the plaintiff " is alleged now to have." In answer to that the plaintiff stated : " By arrangement between the " parties the plaintiff attended on April 7, 1952, at the " surgery of Mr. R. J. W. Withers, F.R.C.S., who " examined the plaintiff on behalf of the defendant. " The deformity referred to in paragraph 2 of the " statement of claim, which arises from the com- " minuted fracture-dislocation of the plaintiff's right " ankle joint, was readily visible on the said April 7, " 1952 and must have been apparent to the said " Mr. R. J. W. Withers." The defendant now moved

(1) In the Queen's Bench Division before Lord MacDermott L.C.J. ; July 18, 1952.

for an order that plaintiff make further and better answer to the notice for particulars.

*Lowry* for the defendant. The defendant is entitled to know the outline of the case the plaintiff is making if only for the purpose of directing his own medical adviser's attention to the relevant matters. It is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent : Odgers on Pleading and Practice 13th edition, p. 139 : 1952 Annual Practice, vol. 1, p. 350. The defendant should have an opportunity to find out if the medical evidence actually agrees with the case the plaintiff is making. In the case of a deformity the holding of the limb may be very important.

[LORD MACDERMOTT L.C.J. What would satisfy you on this ? There has to be a limit somewhere to the extent of particulars. Fifteen years ago no one would have had the temerity to bring an application like this.] Whatever we think is the real case we are entitled to know what the plaintiff says it is : *Lanigan-O'Keeffe v. The Irish American Oil Co.* (1).

*Brown* for the plaintiff. The medical examination took place after the delivery of the statement of claim, and the deformity was seen by Mr. Withers. A deformity is something which by its nature is visible. If it were not it would not be a deformity. It would be very difficult to say what answer could possibly be given to a request for particulars of this sort : *Brown v. Great Western Railway Co.* (2).

LORD MACDERMOTT L.C.J : In this case the plaintiff brought an action claiming damages for personal injuries alleged to have been sustained by him by reason of the negligent driving by the defendant of a motor vehicle. In his statement of claim which was filed on March 19, 1952, the plaintiff alleged that as a result of the defendant's negligence he had suffered " a substantial deformity of the right leg " and in the

(1) (1930) 64 I.L.T.R. 135. (2) (1872) 26 L.T. 398.

particulars therein set out the material injury is described as " severe comminuted fracture-dislocation " of the right ankle joint ". On April 7 the plaintiff was examined on behalf of the defendant by Mr. Withers, a well-known orthopaedic surgeon. On April 18 the defendant served a notice for further and better particulars of, among other matters, " The nature, " site, and extent of the deformity of the right leg " which the plaintiff is alleged now to have ". In answer to that the plaintiff replied :—" By arrange- " ment between the parties the plaintiff attended on " April 7, 1952, at the surgery of Mr. R. J. W. Withers, " F.R.C.S. who examined the plaintiff on behalf of the " defendant. The deformity referred to in paragraph " 2 of the statement of claim, which arises from the " comminuted fracture-dislocation of the plaintiff's " right ankle joint, was readily visible on April 7, 1952, " and must have been apparent to the said Mr. R. J. " W. Withers ".

There is no affidavit from Mr. Withers indicating that he found no evidence of any deformity and so it may be assumed that on the date of the medical examination the alleged deformity was in fact apparent. Had there been such an affidavit the present application might well bear a different complexion.

The object of further and better particulars is to promote a satisfactory process of adjudication and to guard against a party being taken by surprise. There has been a tendency of recent years to give more and more particulars and it has become very difficult to determine where the line should be drawn. I am not satisfied that this tendency to elaborate pleadings by particulars has proved generally helpful.

In my view no further particulars of the deformity in this case are required. As I have said the position might be different had there been, in fact, no readily visible deformity. But, as things are, we have a definite particularization of the injuries which caused the deformity and an examination of the plaintiff by an eminent surgeon, who must be taken to have seen,

and formed his opinion on, the condition of the leg. A deformity is something which in the ordinary course is visible on inspection.

There is nothing to indicate any danger of the defendant being taken by surprise. He has got all that is needed in the way of particulars. The application is refused with costs.

*Application refused.*

Solicitor for the plaintiff : *W. G. Maginess & Son.*

Solicitor for the defendant : *Henry J. Catchpole.*

S.M.M

## IN RE RICKARD, DECEASED.
## HARBISON v. MEANY AND ANOTHER (1).

*Will—Construction—Charity—Gift to be applied to building fund or other religious uses of convent—Validity.*

A testatrix bequeathed a pecuniary legacy to the Superioress of the M. Convent "for the purposes of the religious community of the said Convent", and further bequeathed a moiety of the residue on trust to be paid to the Superioress "to be applied to the Building Fund of the said Convent or to such other religious uses for the benefit of the said Community . . . as the Reverend Mother . . . shall consider advisable." It was conceded that as the convent community was not a merely contemplative order the pecuniary legacy for the purposes of the Community was a valid charitable gift.

*Held*, that the gift of residue for the benefit of the Community, whether it was charitable or non-charitable, did not offend against the perpetuity rule since, notwithstanding the reference to the building fund, it gave an absolute discretion to the Superioress to spend the money for such religious uses for the benefit of the Community as she considered advisable, and was accordingly a valid gift.

ORIGINATING SUMMONS. The testatrix by her will dated November 30, 1931, appointed executors and trustees and made two bequests in the following terms:

"I bequeath the sum of Five Hundred Pounds to "Reverend Mother Ignatius Cosgrove or other the "Superioress at the date of my death of the Convent "of Mercy, Cookstown, for the purposes of the religious "Community of the said Convent."

"As to all the rest residue and remainder of my "property real and personal not hereinbefore disposed "of I direct my said trustees to hold the same in trust ". . . to pay the remaining moiety or half thereof to "Reverend Mother Ignatius Cosgrove or other the "Reverend Mother of the Convent of Mercy Cookstown "at the date of my death to be applied to the Building "Fund of the said Convent or to such other religious "uses for the benefit of the Community of Sisters of "Mercy as the Reverend Mother for the time being

(1) In the Chancery Division before Curran J.: April 28, 1950; May 18, 1953.

" at the date of my death shall consider most advis-
" able."

The testatrix died on January 1, 1946, and probate was granted to the executors on July 3, 1946. The surviving executor brought this summons for the determination of the following questions:

(1) Whether the legacy of £500 to the Reverend Mother of the Convent was (*a*) a valid charitable gift, and if not, (*b*) whether the gift vested in the Reverend Mother absolutely or (*c*) whether it vested subject to trusts.

(2) Whether the gift of residue was (*a*) a valid charitable gift, and if not, (*b*) whether the gift vested absolutely or (*c*) whether it vested subject to trusts.

*O'Neill* for the plaintiff, the surviving executor.

*McSparran K.C.* and *McGonigal* for the Reverend Mother.

*Stewart* for the next of kin.

*Cur. adv. vult.*

CURRAN J. referred to the terms of the bequests and continued:

The first of these bequests is for the *purposes* of the religious Community of the said Convent. I am satisfied on the authorities and indeed Mr. Stewart very properly conceded that this is a valid charitable gift.

The second bequest is not for the *purposes* of the Community, but is expressed to be for the *benefit* of the Community. It is to be applied either to the Building Fund of the said Convent or to such other religious uses, not generally, but for the benefit of the Community of Sisters of Mercy themselves. Having regard to the general charitable intention expressed in the will there is something to be said for the contention that this gift is " charitable " in the legal sense in that it is a provision to help those engaged in charitable work in order to further the charitable work itself. I find it unnecessary, however, to express any

opinion on this point as I am of opinion that the gift is good even as a non-charitable gift, in that it does not in my view offend against the perpetuity rule. The only element suggesting a perpetuity is the provision enabling the gift to be applied to the Building Fund of the said Convent. If this provision stood alone the authorities relied on by Mr. Stewart, such as the case of *In re Dutton* (1), would have to be carefully considered. The answer to the question might be found in the decision of Byrne J. in the case of *In re Clarke* (2). I read the relevant provisions of the will, however, as giving an absolute discretion to the Reverend Mother as to how the money is to be expended provided that it is applied to religious purposes for the benefit of the Community. I find nothing in this tending to offend the perpetuity rule, and the fact that testatrix has indicated as a possible religious purpose something, namely the Building Fund, that might be construed as tending to a perpetuity, does not in my opinion vitiate the gift.

Accordingly I answer the questions set out in the originating summons as follows :—

1. (*a*) Yes.

2. Without deciding whether or not the gift in question is a valid charitable gift I find that it is a valid gift to the said Reverend Mother for such religious uses for the benefit of the said Community as the said Reverend Mother shall consider most advisable.

*Declaration accordingly.*

Solicitors for the plaintiff : *J. & I. Donaghy.*

Solicitor for the Reverend Mother : *E. Malachy Doris.*

Solicitor for the next-of-kin : *J. O'Dempsey.*

J.P.

(1) (1878) 4 Ex.D. 54. (2) [1901] 2 Ch. 110, 120-122.

## DOWNEY AND ANOTHER v. MINISTRY OF COMMERCE AND DOWN COUNTY COUNCIL (1).

*Highway—Road opened by contractor and improperly reinstated—Subsidence—Liability of highway authority and agents of highway authority—Misfeasance or nonfeasance.*

A trunk road in respect of which the Ministry of Commerce was constituted road authority under the Roads Act (Northern Ireland), 1948, and which was managed by a County Council as agents for the Ministry was opened by a builder with the permission of the County Council for the purpose of laying water pipes. Owing to the faulty reinstatement of the road a subsidence occurred which caused personal injuries to the plaintiffs.

*Held*, (i) that the builder was not a servant or agent so as to make either the Ministry or the County Council liable for his misfeasance; (ii) that neither the Ministry as highway authority nor the County Council as agents for the Ministry were liable for the nonfeasance of failing to see that the road was properly reinstated.

APPEAL to the Judge of Assize from a decision of the County Court Judge of Down.

The plaintiffs sued the Ministry of Commerce and the Down County Council for damages for personal injuries and loss sustained by them as a result of an accident on the main road between Newry and Banbridge, which they alleged was caused by a subsidence in that road. The subsidence occurred where Currie, a builder, had opened the road with the permission of the County Council for the purpose of connecting some houses to a water main underneath the road. The plaintiffs alleged that Currie had been negligent and that he was the agent of the defendants, the County Council having required him to agree in writing to reinstate the road properly, and also that the County Council had notice of the dangerous condition of the road. The county court judge dismissed the civil bill, and the plaintiffs appealed to the Judge of Assize.

*Rowland* for the plaintiffs. The County Council and the Ministry are liable for Currie's negligent act,

(1) At Down Assizes before Sheil J.; July 30; Oct. 31, 1952.

because if not a contractor, he was a licensee : *Gilbert v. The Corporation of Trinity House* (1). It was the defendants' duty to see that the road was properly reinstated and they cannot evade that duty by saying that Currie was not their agent : *Hill v. Tottenham U.D.C.* (2). But even if they were not liable for Currie's misfeasance, the County Council were guilty of a negligent act of omission in failing to supervise the operation on the road and they are liable for non-feasance as they are not the highway authority : *Drake v. Bedfordshire C.C.* (3). They do not become highway authority by reason of the fact that they are the agents of the highway authority. The County Council had notice of the dangerous condition of the road and were guilty of a breach of duty in failing to repair it.

*Harrison Q.C.* and *McQuitty* for the defendants. The duty on the local authority to maintain the road is not absolute. It is sufficient in our submission to rely on *Walshe v. Mayo County Council* (4) in which there was a much closer connection between the parties than in the present case. There was no voluntary contract because the County Council were not in a position to refuse Currie permission to open the road : section 52 of the Water Works Clauses Act, 1847. The words in that section, " the pavement of any " street " have been construed to mean " the surface " of any road ". There is no breach of statutory duty or act of misfeasance by the defendants. The duty to take care imposed on a local authority by statute does not alter their immunity in respect of acts of omission : *Harbinson v. Armagh County Council* (5).

*Cur. adv. vult.*

SHEIL J. : On August 16, 1951 the plaintiffs and their cycles were injured by reason of a subsidence in the main road between Newry and Banbridge. That

(1) (1886) 17 Q.B.D. 795.
(2) (1898) 79 L.T. 495.
(3) [1944] 1 All E.R. 633.
(4) (1905) 5 N.I.J. R. 212.
(5) [1902] 2 I.R. 538.

subsidence was caused by the operation of one Currie who had, with the permission of the County Council opened the road for the purpose of connecting some houses to a water main underneath the road. I am satisfied that Currie was negligent in filling in the road material, that such negligence was the cause of the accident, and that the plaintiffs were without blame.

Currie is not sued but the Ministry of Commerce and the Down County Council are sued. By virtue of the Roads Act (Northern Ireland), 1948, the Ministry are, and at the material time were, the road authority for this road and under the Trunk Roads (Delegation of Powers) Order (Northern Ireland), 1949 (S.R. & O. No. 32 of 1949), the Down County Council were at the material time the agents of the Ministry. As such they are both sued.

Now, a road authority as such is not liable for nonfeasance: the authorities on that point are too well known to require citation. But it has been argued for the plaintiffs that since Currie was negligent in reinstating the road that was misfeasance by him and that he was the agent of the defendants, the County Council, and it may be of the Ministry, and that therefore his misfeasance was theirs.

Currie was entitled to open this road for the purpose mentioned. The County Council sought by a written agreement to ensure that he would properly reinstate the road. Did this make him their servant or agent? I cannot think so. He was entitled as I have said to open this road by virtue of section 67 of the Public Health (Ireland) Act, 1878, and he was bound by statute to reinstate it properly, and I cannot see that the attempt by the County Council specifically to bind him to perform what was his statutory duty, can in any way identify them with his wrongful act. Therefore so far as they and therefore the Ministry are concerned this is a case of nonfeasance.

But a second proposition was advanced. It was said that the County Council with notice on August 8, 1951, of the dangerous condition of this road did nothing (other than to write to Currie) to remedy that

condition until August 24, and that since the County Council are no longer the road authority they cannot claim immunity for non-feasance, and I was referred to *Drake v. Bedfordshire C.C.* (1) in which Cassels J. stated : " It is contended on behalf of the defendants " that at most they were only guilty of a non-feasance. " I decide against the defendants on that point. I am " satisfied this was a misfeasance. But the point only " arises if the defendants were the highway authority, " and they were not, and have said so. They do not " become a highway authority because they act under " a contract with a highway authority." The facts of that case were quite different from those in the present case, and, as the learned judge held that there was a misfeasance the dictum is obiter. I have held that qua the present defendants this is a case of non-feasance. The Ministry therefore as road authority is not liable and in the absence of any wrongful act on the part of their agents the County Council I am unable to see how the latter can be liable. The statute has not enlarged their duties.

*Appeal dismissed.*

Solicitors for the plaintiffs : *Wallace & Co.*
Solicitor for the Ministry : *Chief Crown Solicitor.*
Solicitor for the County Council : *Wm. Martin.*

S.M.M.

(1) [1944] 1 All E.R. 633, 637

## BELFAST CORPORATION v. GOLDRING AND ANOTHER (1).

*Planning—Compensation—Award of arbitrator—Appeal—Notice of appeal—Form of hearing of appeal—Planning and Housing Act (Northern Ireland), 1931 (21 & 22 Geo. 5, c. 12), s. 46 (2).*

Where a statute provides a right of appeal but is silent as to the form of the appeal, the appeal takes the form of a complete rehearing.

S. 46 (2) of the Planning and Housing Act (Northern Ireland), 1931, provides that a party named in an award of compensation by an arbitrator appointed under the provisions of that Act who is dissatisfied with the amount of the award may appeal to the Supreme Court.

*Held*, that since the section does not provide for any other form of appeal, the appeal under the section takes the form of a rehearing, and a notice of appeal which shows clearly that the party appealing is dissatisfied with the amount of compensation awarded need not further set out the grounds of appeal relied on.

STATUTORY APPEAL from an award of compensation in respect of injurious affection of property made by an arbitrator under the provisions of the Planning Acts (Northern Ireland), 1931 and 1944.

The respondents, having been refused permission to develop certain property in the City of Belfast by the appellant Corporation, the Interim Planning Authority for Belfast, applied for compensation under the provisions of section 9 of the Planning and Housing Act (Northern Ireland), 1931, The matter was referred to an arbitrator in the manner provided by that section. In the course of the arbitration the arbitrator agreed to state a case for the opinion of the court on certain questions as to the basis on which compensation was to be awarded, but before that case could be heard the arbitrator died. The matter was referred to a second arbitrator who heard the evidence and by an award dated August 25, 1952, awarded the respondents the sum of £25,620 with costs. The Corporation appealed

(1) In the Chancery Division before Curran J.: Jan. 19, 20, 1953.

against the award and gave notice of appeal in the following form :

" Take Notice that upon the expiration of eight " days from the service on you of this notice or so " soon thereafter as Counsel can be heard, Counsel " on behalf of the Appellants will move this honour- " able Court for an order that the whole of the " award made herein by Lawrence Henry Liddle, the " Official Arbitrator, for the purposes of the above " entitled Acts dated the 25th day of August, 1952, " whereby he awarded the Respondents the sum of " £25,620 compensation in respect of the alleged " injurious affection to the above mentioned pre- " mises with costs be set aside and that in lieu " thereof the amount of compensation be reduced to " nil or such sum as this honourable Court may deem " proper or for such other order as to the Court may " seem fit and for the costs of the hearing before the " said Arbitrator and of this Appeal ".

The case is reported only on two preliminary points which were argued at the beginning of the hearing, namely whether the appeal took the form of a rehearing and whether the notice of appeal was sufficient.

*McVeigh Q.C.*, *Harrison Q.C.* and *Gibson* for the appellants contended that the appeal was by way of rehearing and that the respondents should open the appeal and adduce evidence in support of their claim.

*Patton Q.C.* and *Moody* for the respondents contended that the appellants should begin, and that if they wished to rely on any evidence they should have brought up the evidence adduced before the arbitrator in the manner provided by the Rules. They referred to section 47 (1) of the Act of 1931, Order 59A, rules 1, 7 and Order 58, rule 11. They further contended that the notice of appeal was defective in that it did not set out the grounds upon which the appellants sought to have the award set aside.

*Cur. adv. vult.*

CURRAN J. cited the following passage from *Ex parte McFadden* (1): "Now, I shall first consider the "question what is the jurisdiction usually known to "English law, when power is given to 'entertain an "'appeal'. One thing is perfectly plain—that in an "appeal given by statute *simpliciter*, and without any "limitation of the powers of the Court of Appeal, the "Court must decide solely upon the evidence that is "brought before it, as distinguished from the evidence "that was brought before the Court from which the "appeal is taken, and that, as a general rule, subject to "some exceptions—such, for instance, as the death of "a witness, or where there is some express statuable "enactment the evidence that has been given before "the inferior tribunal is not even admissible before the "Court of Appeal. That is well settled law. It is "almost pedantry to refer to cases in support of it, but "I may cite a few; the first is that which has been "referred to by the Attorney-General *Breedon v. Gill* "(2) and the same view was followed in *The King v.* "*Commissioners of Appeal in Excise Matters* (3) where "the practice of declining to hear evidence on the "appeal was held by the Court of Queen's Bench in "England to be illegal; and if any other authority "were required in support of the proposition, there is "that of *The Queen v. Pilgrim* (4). I really do not "cite these authorities as establishing any new pro-"position at all—they are authorities that determine "from the earliest to the latest times what is the "jurisdiction of the Court of Appeal, when the appeal "is given by statute which contains no express limita-"tion upon the subject. It is not, as has been some-"times erroneously thought (in analogy to appeals "to the House of Lords under the old system from "decrees of the Court of Chancery) that it is an appeal "upon the evidence that was given before the Court "below; and that all the appellate tribunal has to "determine is whether the Court below was right or

(1) (1888) Judgments of the Superior Courts in Ireland, 165, 166.

(2) (1697) 1 Ld. Raym. 219.

(3) (1814) 3 M & S. 133.

(4) (1870) L.R. 6 Q.B. 89, 95.

" wrong on the evidence before it. The law excludes, " without express legislative enactment, from the " consideration of the appellate tribunal, the evidence " that was given before the Court below, and requires " that its adjudication shall be made solely on the " evidence that it has itself heard."

His Lordship also referred to the judgments of Humphreys J. in *Fulham Borough Council v. Santilli* (1) and *Stepney Borough Council v. Joffe* (2), and continued as follows :

I am of the opinion that the appeal provided for by section 46 of the Planning and Housing Act, 1931, is an appeal simpliciter, and accordingly that the principle laid down in the authorities which I have referred to is applicable in this case. It follows therefore not only that this appeal is not based on the evidence adduced before the arbitrator, but also that I am not even entitled to look at that evidence. I must hear the appeal and all the evidence which is adduced before me and come to a determination upon that evidence without reference to the proceedings before the arbitrator.

In those circumstances, and having regard to the fact that the basis of an appeal under section 46 is the dissatisfaction of the appellant with the amount of compensation awarded, I consider that it would not have been proper for the appellants in this case to have set out in their notice of appeal the grounds upon which they rely, in a manner which would be appropriate to an appeal by way of a special case, where objection might be taken that the arbitrator was wrong in some particular respects. In this case, all that is required is that the notice should set out the fact that the appellants are dissatisfied with the amount of compensation awarded, and on looking at the notice it seems quite clear to me that the appellants are dissatisfied with the amount of the award. These matters are apparent, even without reference to the heading of the notice which is entitled in the matter of the Planning Acts, and in the matter of a claim for compensation in respect of alleged injurious affection of the premises in question

(1) [1933] 2 K.B. 357, 367. (2) [1949] 1 K.B. 599, 604.

[His Lordship read the notice of appeal.]

I cannot see that that notice is wrong. It may be that the appellants have not, as they should have done, stated expressly that they are dissatisfied with the compensation awarded but they do make it clear that they are dissatisfied and I consider that it would be placing too much reliance on a technicality if I were to hold that the notice is bad.

I do not lose sight of the fact that the Planning Acts provide for another form of appeal to the High Court, that is an appeal by way of case stated—a method of appeal which was resorted to previously in connection with this matter. Appeals by way of case stated are brought under the provisions of section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, and in the two forms of appeal provided for in that section, the appeal is based on the evidence adduced before the arbitrator and is confined to the questions of law arising thereon. That does not however take away or affect the general right of appeal given by section 46 of the 1931 Act.

I am satisfied accordingly that I must hear this appeal on the basis of a full rehearing and that I am not concerned with what happened at the hearing before the arbitrator. The Corporation are dissatisfied with the amount of the award, and have asked the High Court to determine the amount of compensation which they are to pay.

I have noted that Mr. McVeigh, on behalf of the Corporation, has asked for leave to amend the notice of appeal should it be found necessary, but I rule that no amendment is necessary.

*Case adjourned. Subsequently an order was made by consent varying the amount of compensation.*

Solicitor for the Corporation : *Samuel Love.*

Solicitors for the respondents : *N. & F. Tughan and Walmsley.*

J. P.

## ARTT v. W. G. & T. GREER (A FIRM) (1).

*Costs—Contributory negligence—Reduction of damages to amount within County Court jurisdiction—R.S.C. Or. 65, r. 61 (42)—Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948 (12 & 13 Geo. 6, c. 23), s. 2.*

A plaintiff whose damages are reduced by reason of contributory negligence to £100 or less is not, in the absence of special circumstances, entitled to more than half costs having regard to the provisions of Or. 65, r. 61 (42).

*Kelly v. Stockport Corporation* [1949] 1 All E.R. 893 doubted and not followed.

ACTION tried before Lord MacDermott L.C.J. and a jury.

In this action for damages for personal injuries sustained by the plaintiff in the course of his employment the jury assessed the total damages at £150, but having apportioned the blame as to one-third to the plaintiff and two-thirds to the defendant they awarded the plaintiff the sum of £100.

*Agnew Q.C.* and *Higgins* asked for judgment with ordinary costs.

*Jones Q.C.* and *Shaw* for the defendant.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J.: In this action the plaintiff sued his employer, the defendant, for damages for negligence. The jury found that the defendant was negligent and that the plaintiff was guilty of contributory negligence. After making the deduction in respect of statutory benefits as directed by section 3 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, they measured the total damages sustained at £150 and then, in

(1) In the Queen's Bench Division before Lord MacDermott L.C.J.: July 8, 28, 1953.

response to the question "to what sum is it just "and equitable to reduce the total damages having "regard to the plaintiff's share in the responsibility "for his injuries?" they reduced this figure by a third and thus fixed the sum recoverable by the plaintiff at £100.

On these findings, and in view of the terms of section 2 of the said Act of 1948, the plaintiff is clearly entitled to judgment for £100. What remains to be decided is a question of costs. Does subrule (42) of rule 61 of Order 65 apply? This is a matter of some general importance and all the more so because, as will be seen, it also involves a question as to the jurisdiction of the county court in what is now a very common type of suit.

The material part of subrule (42) reads as follows:

"... in any cause or matter which having "regard to the amount recovered or paid in settle- "ment or to the relief allowed, could have been "brought in the County Court the plaintiff shall not "be allowed on taxation more than one-half of the "ordinary costs, unless the Judge at the trial shall "certify ... that such cause or matter was fit to "be tried in the High Court by reason of the ques- "tions of law or issues of fact involved or the extent "of the right to property affected or other special "circumstances".

The point in issue cannot be avoided by certification under this subrule. There was nothing in the nature of the case, in its facts or its law, to justify a certificate. The facts were simple, the relevant law well settled and the £100 awarded reasonable to the point of generosity.

The question, then, is whether, in the words of the subrule, this action "having regard to the amount "recovered ... could have been brought in the County "Court." The amount recovered is clearly the £100, and the material jurisdiction of the county court is, by section 1 (1) of the County Court Jurisdiction Act (Northern Ireland), 1942, "to hear and determine all "actions ... for any sum, damages or penalty not "exceeding one hundred pounds, in all cases except

" slander, libel and breach of promise of marriage." This subsection further provides that section 35 of the Civil Bill Courts (Ireland) Act, 1851, shall accordingly have effect as if " one hundred pounds " were substituted for " fifty pounds " therein, but I do not think it necessary to quote the language of this earlier enactment. So far as I can see it does not qualify or extend the wording of the Act of 1942 as above set out in any relevant respect.

Now if one could pause here without looking beyond the terms of subrule (42) and the provisions conferring jurisdiction on the county court, the problem would, I think, be relatively simple. The plaintiff has recovered £100 in this action and he could have sued for that sum in the county court. Thus far there seems to be no reason at all why the suit could not " have been brought " in the County Court " and why subrule (42) should not apply. But the contention of the plaintiff, in its substance, was that one could not pause here, that section 2 (1) of the Act of 1948 was also relevant, and that its effect, having regard to the findings in this action, was that while the plaintiff could have sued for £100 in the county court he could not have obtained a decree in that jurisdiction for the whole of that amount. This seems to me to be the crux of the matter. If the plaintiff is right and he could not have obtained a decree for £100 in the county court, subrule (42) is obviously inapplicable. But if he is wrong and the county court could have awarded him that sum in damages then the subrule is, no less clearly, in point.

The material parts of section 2 (1) of the Act of 1948 read thus :

" Where any person suffers damage as the result " partly of his own fault and partly of the fault " of any other person or persons, a claim in respect " of that damage shall not be defeated by reason of " the fault of the person suffering the damage, but " the damages recoverable in respect thereof shall be " reduced to such extent as the court thinks just and " equitable having regard to the claimant's share in " the responsibility for the damage :

" Provided that—

" .....

" (*b*) where any contract or enactment providing " for the limitation of liability is applicable " to the claim, the amount of damages " recoverable by the claimant by virtue of " this subsection shall not exceed the " maximum limit so applicable ".

Subsection (2) of this section has also to be considered. It runs :

" Where damages are recoverable by any person " by virtue of the preceding sub-section subject to " such reduction as is therein mentioned, the court " shall find and record the total damages which " would have been recoverable if the claimant had " not been at fault ".

Apart from authority and looking only to the language of these provisions, I should not be disposed to regard the process they establish for cases of contributory negligence as meant to be affected by the fact that the trial court had a jurisdiction limited in amount save, of course, as respects the final figure, the outcome of the process, which measures what the plaintiff is to get. What the section was aimed at securing is, I consider, reasonably plain. The plaintiff whose own fault has contributed to his damage is no longer to be without all redress if the damage is also the result of fault on the part of the person he sues. But in such case the damages which may be awarded to the plaintiff will not be the full damages suffered but a part thereof which will be just and equitable having regard to the plaintiff's share in the responsibility. If this is the correct view I see no reason why the county court judge should regard the limits of his jurisdiction until the total damages have been reduced to such sum as is " just and equitable ". If that sum is more than £100 there is no jurisdiction unless the excess is abandoned under section 36 of the Act of 1851 ; but if it is £100 or less why should there not be a decree for the " just " and equitable " part of the whole ? Take, for example, the case of a plaintiff whose motor car has

been damaged by the defendant's negligence to the extent of £200. The plaintiff realises that he himself was equally to blame. Why should he not limit his claim to £100 and sue in the county court? And having done so why should he not get a decree for that amount if he proves his case?

The answer made by the plaintiff to this last question is based upon the provision of section 2 (1) that it is "the damages recoverable" in respect of the damage suffered that are to be reduced and also upon the provision of section 2 (2) that "the court shall find and "record the total damages which would have been "recoverable if the claimant had not been at fault". Both of these provisions, it was said, referred to the amount recoverable in the court of trial and, accordingly, where the county court was the court of trial, to a sum not exceeding £100. And that, the argument proceeded, being the maximum sum for which a decree could be obtained in that jurisdiction the plaintiff, as the person guilty of contributory negligence, could only have obtained judgment for less than £100 had he sued by civil bill, as he would have had to submit to some reduction of the maximum recoverable.

In support of this submission the plaintiff relied upon the decision of the English Court of Appeal in *Kelly v. Stockport Corporation* (1). In that case the plaintiffs brought an action in the county court claiming £200 damages, the maximum sum recoverable in that jurisdiction in England. The county court judge assessed the damages suffered at £300, but finding the injured plaintiff had been one-third to blame made an award of two-thirds of that sum, that is to say, of £200, the full amount claimed. In so doing, the learned judge considered he was acting in accordance with the provisions of subsections (1) and (2) of section 1 of the Law Reform (Contributory Negligence) Act, 1945, which are in the same terms as the corresponding subsections of section 2 of the Northern Ireland Act of 1948. The Court of Appeal (Tucker, Asquith and Singleton L.JJ.) held that this was wrong on the ground that the reduction in respect of the contributory

(1) [1949] 1 All E.R. 893.

negligence ought to have operated on the £200, which was the amount claimed and the maximum sum recoverable in the county court, and not on the £300, which was the amount of the damages actually sustained. In the course of his judgment Tucker L.J. (as he then was) says (1): "In the present action the "damages recoverable were limited, by reason of the "provisions dealing with the jurisdiction of the county "court, to £200. It is, therefore, the £200 which has "to be reduced. In other words, it is not the damage "sustained, in fact, by the plaintiff, but the damages "recoverable in respect thereof which must be taken "into consideration in this connection".

The other members of the court were of the same opinion and the decision, though not in strictness binding upon me, is that of a court of high persuasive authority. But with great respect to the learned and distinguished judges who constituted it, I am unable to share their conclusion. I am not satisfied that the words "damages recoverable" in subsection (1) were intended to mean one thing in one court and a different thing in another court according to the limits of jurisdiction. The expression is not a very happy one because whatever else may be in doubt it is clear that the damages described as "recoverable" are just the damages which the claimant, on the hypothesis of the subsection, cannot and never could recover. A strictly literal interpretation of this expression must, therefore, be rejected. One must consult the purpose and policy of the section and seek a construction conforming thereto and, at the same time, compatible with the language of the text.

Now so far as the text is concerned it is, I think, impossible to resist the conclusion that when subsection (1) speaks of "the damages recoverable" in respect of the damage suffered it means neither more nor less than what subsection (2) calls "the total "damages which would have been recoverable if the "claimant had not been at fault". But is this a reference to the claimant's compensatory rights at

(1) Ibid. 895.

large, that is, to those rights as determined by what I may call the essential elements, namely, the amount of the damages suffered by reason of the defendant's wrongful act and the assumption that the claimant was not also at fault? Or is it a reference to those rights as determined by those elements in conjunction with some collateral factor such as the monetary limits of the jurisdiction of the court of the claimant's choice?

As a matter of first impression section 2 seems to me, as I have already indicated, to be primarily directed to accomplishing a change in the *general* law. It is true that it deals expressly with certain procedural matters—e.g. the recording of the total damages under subsection (2) and the function of the jury under subsection (6). But the essence of subsection (1) appears to be substantive rather than adjectival in nature. This view, to my mind, finds support in the provision that the extent of the reduction is to be just and equitable having regard to the claimant's share in the responsibility. The words "just and equitable" can operate naturally on the actual loss, but to apply them to an arbitrary figure fixed as the limit of a particular court's jurisdiction raises quite different considerations. Take, as a simple example, the case of A and B who are equally at fault and who each suffer damage, A in the sum of £100, B in the sum of £200. Each sues the other by civil bill. No doubt it is "just and equit-" able" that A's damages should be halved so that he gets an award of £50. But can the same be said of an award for that amount in favour of B which is made on the ground that, though his loss has been twice that of A, the "damages recoverable" in his case were he without fault would be £100 and no more? In its context "just and equitable" must have reference to what will be just and equitable between the parties and a construction which would produce such an untoward result as that mentioned ought not, in my opinion, to be accepted as the intention of the legislature without the closest scrutiny. I think the difficulty illustrated by this example is really fundamental, for if the whole basis of the computation can be changed from loss to jurisdiction it would seem to

follow that the standard of what is "just and equitable" must change also.

Again, it appears to me that proviso (*b*) to subsection (1) contains a fairly clear indication that the view taken in *Kelly v. Stockport Corporation* (1) was founded on an unduly narrow interpretation of the words "damages recoverable". It may be that this proviso was not intended to embrace enactments limiting the competence of courts, but the reasoning of the Court of Appeal would seem as applicable to cases coming within it as to cases involving the limits of jurisdiction. If the "damages recoverable" have to be measured on occasion by what the court has power to award, I see no reason why they should not also have to be measured by overriding limits imposed by contract or statute. But if that were so proviso (*b*) would become not only unnecessary but inapt, for in such case the award would almost inevitably be less than the limit and, certainly, could never exceed it. Let me take by way of illustration, the case of a fare paying passenger who is injured partly by the fault of the carrier and partly by his own fault in circumstances which render a limit of liability provided for by the contract of carriage applicable. Proviso (*b*) as I read it, says that the amount recoverable by such a passenger "by virtue "of this sub-section" is not to exceed such limit. What, then, happens if the actual damages suffered by the passenger are more than the limit? If the "damages recoverable" are the limit the award can never be more. But if these words point to the actual loss suffered then the award might exceed the limit were it not for proviso (*b*). It seems to me that this proviso contemplates that, before it comes into force, the process of reduction will have operated on the actual loss, and if this is right it is a strong indication that the policy of the subsection is opposed to the contention of the plaintiff.

The effect of the view I favour must next be considered. This is not to say that the results of a particular statutory interpretation, no matter how strange,

(1) [1949] 1 All E.R. 893.

are necessarily a conclusive criterion. But in a case of this sort it is legitimate to take the results into account and this, indeed, was done by the Court of Appeal in *Kelly v. Stockport Corporation* (1). Thus, Tucker L.J. says in that case: "If counsel for the "plaintiffs is right, the result of this sub-section would "be to require the county court judge to record, as "the sum which would have been recoverable, a sum "in excess of that which would have been recoverable, "a sum in excess of that which he had jurisdiction to "award. In my opinion, £200 was the sum which had "to be apportioned in this case, and the result is that "the maximum sum recoverable by the plaintiffs is "£133 6s. 8d." (2). And Singleton L.J. adds this: "Despite the argument of counsel for the plaintiffs I "feel it was not within the contemplation of the "legislature that, in a case of this nature, if, perchance, "the plaintiff was found four-fifths to blame, the "county court judge should have jurisdiction up to "£1,000 damages in order that the plaintiff could "recover £200." (2). In this country, at any rate, there is nothing anomalous about these results. The limits of the county court jurisdiction are fixed, as respects claims in tort, with reference to the amount which may be claimed and not with reference to the computations and findings which may be requisite in order to ascertain what may be awarded. Where a claimant abandons the excess over £100 it may still be necessary to ascertain what would be recoverable if the jurisdiction had no limits, in order to determine the claim. A, for instance, sues B by civil bill on a promissory note for £150, abandoning the excess over £100. B alleges discharge by payment. The county court judge may have to find that £150 is due in order to give a decree for the sum claimed, but he does not need to invoke a jurisdiction up to £150 to do that. And cases may also arise where, without any question of the excess being abandoned, the court must consider liabilities beyond the maximum demand in order to give effect to some special defence. It seems to me that the County Court would be doing nothing essen-

(1) [1949] 1 All E.R. 893. (2) Ibid. 895.

tially different from this or be exceeding its jurisdiction if it recorded the actual loss sustained whatever its amount. As I have said, I see nothing anomalous about a claimant proving a loss of, say, £1,000 in the County Court in order to get a decree for £100 or less. But if there is anything strange about this it is, to my mind, more than offset by the odd results which would flow from following the decision in *Kelly v. Stockport Corporation* (1). In this connection I may refer, by way of example, to the case of *Barry v. Winter* (2) recently tried before Sheil J. There the jury found for the plaintiff in the sum of £25 because, though the total damages suffered were £500, they held him 95 per cent. responsible for the accident. It would indeed be startling if, in the circumstances, this measure of relief could only have been obtained in the High Court. Yet that is the conclusion to which *Kelly v. Stockport Corporation* (1) necessarily leads.

I cannot differ from the views expressed by the distinguished judges who decided that case without some feeling of diffidence and hesitation. But after careful consideration, and for the reasons I have mentioned, I have come to the conclusion that the county court would have had jurisdiction to award the plaintiff the sum he has recovered in this action. Accordingly I direct that judgment be entered for the sum of £100 with costs to be taxed on the basis that subrule (42) of rule 61 of Order 65 applies.

*Judgment accordingly.*

Solicitors for the plaintiff: *Corr & Sally.*

Solicitors for the defendant: *McKinty & Wright.*

S.M.M.

(1) [1949] 1 All E.R. 893. (2) Not reported.

## REG. (McKEE) v. BELFAST CORPORATION (1).

*Local Government—Contract by local authority—Non-compliance with standing orders of local authority—Mandamus—Ratepayer an aggrieved party—Belfast Corporation (General Powers) Act (Northern Ireland), 1948 (12 & 13 Geo. 6, ch. i), s. 50 (2).*

S. 50 (2) of the Belfast Corporation (General Powers) Act, 1948, provides that all contracts made by the Corporation or a committee thereof shall be made in accordance with the Corporation's standing orders. Standing Order No. 59 provides that "Except in cases of "purchase by auction . . . or in cases where special consideration "arises (such special consideration to be determined by the committee "concerned and recorded in the minutes), all tenders . . . where the "gross amount exceeds £100 shall be obtained by competition "publicly invited . . . and the acceptance of all tenders shall be "reported to the Council".

The Corporation by its Electricity Committee invited tenders from five selected contractors for the supply and installation of electrical equipment at a power station, and proposed to enter into contracts on the basis of these tenders. The Electricity Committee in so doing had the advice of the Acting City Electrical Engineer and was aware of the provisions of Standing Order No. 59, but the minutes of the Committee recorded no express determination that there were any special considerations affecting the contracts.

The prosecutor, a ratepayer and electricity consumer resident within the City of Belfast, applied for a writ of mandamus to compel the Corporation to advertise publicly for tenders on the grounds that tenders substantially lower than those received could have been obtained by public competition.

*Held* (i) that the duty imposed on the Corporation to comply with its standing orders in relation to contracts is a duty which may be enforced by a writ of mandamus;

(ii) that a ratepayer has a legal specific right to the performance of that duty because the expenditure of public funds is a matter affecting the individual interest of every person who has to contribute to those funds;

(iii) that in the circumstances the Corporation was in breach of its duty, and the breach was not merely a technical breach;

(iv) that as the Corporation was not bound in any event to advertise for tenders, but only to comply with its standing orders, the discretion of the court should be exercised so as to give the Corporation an opportunity of regularising its position before making a peremptory order.

(1) In the Queen's Bench Division (Crown Side) before Curran J.: Aug. 25, 26; Sept. 1, 1953.

APPLICATION for an order for a writ of mandamus.

At the original ex parte application Curran J. had directed that notice of the application be served on the respondents, and the hearing was treated by consent of the parties as taking the place of the usual procedure of shewing cause why a conditional order should not be made absolute.

The facts of the case and the arguments of counsel sufficiently appear in the judgment.

*Nicholson Q.C.* and *Rowland* for the prosecutor.

*Warnock A.-G.*, *McVeigh Q.C.* and *Brown* for the Corporation.

*Cur. adv. vult.*

CURRAN J.: The prosecutor, William Cecil McKee, who is a householder, ratepaper and electricity consumer residing in the County of the City of Belfast and within the area of supply of the Belfast Corporation (which I will hereinafter refer to as "the Corporation") as statutory undertaker for the supply of electricity, applied ex parte on August 11, 1953, for a conditional order for a writ of mandamus directed to the Corporation commanding them to obtain tenders for certain boilers, plant and ancillary equipment by competition publicly invited in one or more of the local daily papers and in such other publications as may be considered necessary by the committee concerned. The said boilers, plant and equipment were required under a scheme prepared by the Ministry of Commerce pursuant to section 5 of the Electricity (Supply) Act (Northern Ireland), 1948, for the extension of the power station at West Twin Island, Belfast, being a generating station for supplying electricity generally for Northern Ireland. Having heard Mr. Nicholson, Q.C. for Mr. McKee, I directed that written notice of the application be given to the Corporation and adjourned the matter until August 25th. On that date and on the following day I heard counsel for both parties.

It was contended on behalf of the prosecutor that by virtue of the provisions of section 50 (2) of the Belfast Corporation (General Powers) Act, 1948, a public duty was imposed on the Corporation to comply with its standing orders in the making of contracts and, in the case of contracts for the supply of goods or materials or for the execution of works, to invite tenders, except as otherwise provided by or under the standing orders. The subsection provides that the standing orders shall regulate the manner in which such tenders shall be invited.

The relevant standing order is No. 59 which provides as follows :

" Except in cases of purchases by auction or at " public fairs or markets, or in cases where special " consideration arises (such special consideration " to be determined by the committee concerned and " recorded in the minutes), all tenders or purchases " where the gross amount exceeds £100 shall be " obtained by competition publicly invited in one or " more of the local daily papers, and in such other " publications as may be considered necessary by the " committee concerned, and the acceptance of all "tenders shall be reported to the Council ".

It was further contended on behalf of the prosecutor that there had been a breach of this public duty, the Corporation having failed to invite tenders for the said boilers, plant and equipment by public advertisement as required by Standing Order 59, and having, through its Electricity Committee, only invited tenders from five selected companies. It was conceded that such procedure could have been properly adopted by the said Committee had they first of all determined that a special consideration had arisen within the meaning of the said standing order and had such special consideration and determination been duly recorded in the minutes ; but it was contended that no such determination had been made and that no such special consideration or determination had been recorded.

It was suggested that the five selected companies who were invited to tender were members of an association or a " ring " and that a saving of some £226,000

could be effected by inviting tenders by public advertisement. I use the word "suggested" as I would not be prepared to determine these issues on the evidence before me. As I do not consider it necessary to go into such matters I have not thought fit to give any further opportunity to the parties to adduce evidence.

Finally it was contended on behalf of the prosecutor that he is aggrieved by this breach of public duty by the Corporation and that the Corporation having been requested by him to obtain tenders for the said boilers, plant and equipment by competition publicly invited in accordance with Standing Order 59 and having refused so to do, he is entitled to apply for a writ of mandamus.

It was contended on behalf of the Corporation that :

(1) the prosecutor was not entitled to apply for a writ of mandamus as there was no legal right on the part of the prosecutor to the performance of a public duty ;

(2) the Corporation had duly complied with Standing Order 59 ;

(3) if there was any default on the part of the Corporation in this respect it was a matter of form and not of substance ;

(4) even if the Corporation were technically in error the error had been obliterated by the full disclosure of the facts when the Corporation took its final decision on July 27th ;

(5) there was no evidence of any private arrangement among the five companies that had been invited to tender ; and

(6) there was no evidence fit for consideration that the Corporation would lose £226,000 or any sum.

In my opinion it is clear that section 50 of the Belfast Corporation (General Powers) Act, 1948, imposes a duty on the Corporation to comply with its standing orders in the making of contracts and, in the case of contracts for the supply of goods or materials or for the execution of works (as in the present case), to invite

tenders in the manner provided by the standing orders, except as otherwise provided by or under the standing orders. Whether this duty be described as a public duty or a quasi public duty, I am satisfied that a person who establishes that he has a legal right to the performance of such duty is entitled to apply for a writ of mandamus. He must, of course, satisfy the court that there has been a breach of such duty, that he has demanded the performance of such duty and the Corporation has refused such performance, that the remedy by mandamus is appropriate and that no other remedy is open to him which is not less convenient, beneficial and effective. Even then the granting of the order is a matter in the discretion of the court.

Has the prosecutor a legal right to the performance of such duty? He says that the object of having public advertisement for tenders is to ensure that there will be competition between the suppliers interested, resulting in the materials being supplied and the work executed at the lowest possible cost. If you limit or remove this competition the natural and probable consequence will be that you will have to pay more In my opinion this contention is well founded. Indeed I do not understand it to be in dispute. It is accordingly in the interests of those who have to pay that the procedure with regard to tenders is laid down in general terms by section 50 of the Belfast Corporation (General Powers) Act, 1948, and in more detail by Standing Order 59. The prosecutor says he is one of the people who will have to pay either as a ratepayer or as an electricity consumer or both. This has not been disputed on behalf of the Corporation. What the Attorney-General says on behalf of the Corporation is that the prosecutor must show that he has, as an individual, and as distinct from the general class of ratepayers or electricity consumers, a legal specific right to the performance of the duty in question. I can appreciate this contention in a case where there is a statutory duty to ratepayers generally but where the particular breach alleged can only affect a certain number of such ratepayers. An example of this type is to be found in the case of *The King* (*Westropp*) *v. Clare*

*County Council*, (1) a ratepayer obtained an order for a writ of mandamus directed to the County Council to enforce the performance of their statutory duty to keep and put roads in good condition of repair. The ratepayer in question was personally aggrieved by reason of the fact that his lands adjoined the road in question, and it was the only means of access to his demesne and house. A ratepayer who was unaffected by the condition of the road in question would not have been aggrieved and would not, presumably, have been entitled to apply for a writ of mandamus. Where, however, a ratepayer's pocket is affected surely he is personally aggrieved and it can be no answer to say that others are equally aggrieved. I respectfully agree with Sir Peter O'Brien C.J. when he says in *Reg. (Bridgman) v. Drury* (2): "In my judgment a ratepayer "is clearly aggrieved if his money is applied to an "unauthorised purpose. It is a typical instance of "'being aggrieved'. The wrong application of money "which comes from the ratepayer's own pocket is a "very acute grievance". In the present case the Corporation were dealing with a contract involving some millions of pounds. Every ratepayer who shares the burden of this expenditure is in my opinion clearly aggrieved by a breach of duty that increases the financial burden he has to share. In my judgment the prosecutor as a ratepayer has a legal specific right to the performance of the duty in question and is, accordingly, a person on whose application an order may be made for a writ of mandamus.

It is common case that on the recommendation of the Acting City Electrical Engineer the Electricity Committee of the Corporation instructed him to obtain tenders from five selected suppliers for the boiler plant in question. This instruction was given after the Deputy Town Clerk had directed the Committee's attention to Standing Order No. 59 relating to the invitation of tenders by public advertisement. One might be inclined to assume that this departure from the procedure of inviting tenders by public advertise-

(1) [1904] 2 I.R. 569. (2) [1894] 2 I.R. 489, 499

ment was decided upon because the Committee were satisfied that there was special consideration within the meaning of Standing Order No. 59 in that the Acting City Electrical Engineer, as recorded in the minutes of the Committee, had recommended this course on the ground that for certain material reasons no time should be lost in placing orders for such plant. There is absent, however, from the various minutes relating to the plant in question any specific record that the Committee had decided that the circumstances constituted special consideration within the meaning of Standing Order No. 59. This is rendered more significant by the fact that such a record appears frequently in the minutes in relation to other items. I cannot avoid the conclusion that there was some reason for not recording a determination by the Committee that there was a special consideration. I am not prepared to assume that the absence of such a record was due to inadvertence. The attention of the Committee had been specifically drawn to the requirements of Standing Order No. 59 and I am satisfied that had any such determination been made it would have been duly recorded in the minutes. Accordingly I am not satisfied on the evidence before me that any such determination was made. If I am right in this then it would appear that the Electricity Committee were guilty of a breach of their statutory duty in failing to invite tenders for the plant in question by public advertisement as required by section 50 of the Belfast Corporation (General Powers) Act, 1948, and Standing Order No. 59.

It was contended on behalf of the Corporation that there was special consideration, as appears from the report of the Acting City Electrical Engineer recorded in the minutes, and that in substance the Committee must have determined that there was such a special consideration and that, accordingly, the absence of a specific record of such determination is merely a formal matter. In other words that in substance there was no breach of duty. I was impressed by this contention, but on consideration and for the reasons I have already stated, the substance of the matter is, in

my opinion, on the evidence before me, that no such determination was made. The absence of such a determination in my judgment is a matter of substance and not merely of form.

The fact that the whole matter was fully discussed at various meetings of the Electricity Committee and the Council is stressed as establishing that the final decision to award the contract for the plant in question to one of the five selected companies was made by the Committee and the Council with full knowledge of all the relevant considerations and that fact obliterated any technical error there may have been on the part of the Electricity Committee. The difficulty I have in accepting this contention is that for some reason, as I have found, no specific determination as to special consideration was ever made, and that this is far from being a mere technical error.

In my judgment, as the prosecutor has established a breach of statutory duty on the part of the Corporation, and as he has, before coming to court, demanded the performance of that duty by the Corporation and this has been refused, the prosecutor has established a prima facie case for a mandamus. What I must now consider is whether in the exercise of my discretion I should make the order sought.

What has impressed me from the outset is that under section 50 of the Belfast Corporation (General Powers) Act, 1948, and Standing Order No. 59, there is a discretion given to the Electricity Committee as to whether in a particular matter they will invite tenders by public advertisement or in some other manner. This discretion is subject to the limitation that they must invite tenders by public advertisement unless they determine that there is special consideration that justifies a departure from such procedure. Whether there is such special consideration is a matter for the Committee to determine. The court would not, therefore, make an order for a writ of mandamus commanding the Corporation to proceed to invite tenders by public advertisement. The furthest it could go would be to require the Corporation to proceed in the matter

in compliance with Standing Order No. 59. In the result the Electricity Committee might proceed to determine that there is special consideration and have this duly recorded in their minutes and then they might properly proceed to award the contract in question to the company whose tender has already been accepted. I apprehend that this judgment having been delivered, and if it remains unchallenged, no writ of mandamus would be required to secure that Standing Order No. 59 is complied with before the Corporation execute the contract in question. If, as may be the case, the Electricity Committee are not prepared to determine that there is special consideration within the meaning of Standing Order No. 59, tenders must be invited by public advertisement.

The conclusion I have come to is this, that as the Corporation has it in its power to do exactly what the prosecutor seeks to prevent them doing, namely, to place the contract in question without public advertisement for tenders, I would be prepared to adjourn the matter to enable the Corporation to comply with Standing Order No. 59 provided the status quo is maintained until this has been done. If this course were not acceptable to the Corporation I would consider it necessary to grant the order in terms requiring the Corporation to proceed in the matter as required by section 50 of the Belfast Corporation Act, 1948, and Standing Order No. 59.

*Case adjourned. The Corporation subsequently resolved to invite tenders publicly for the contracts.*

Solicitors for the prosecutor : *Hamill, Davison & Co.*

Solicitor for the Corporation : *Samuel Love.*

J.P.

## QUINN v. MINISTRY OF COMMERCE AND ARMAGH COUNTY COUNCIL (1).

*Highway—Non-repair—Ineffective temporary repair—Trunk road—Liability of highway authority and its agent—Roads Act (Northern Ireland), 1948 (12 & 13 Geo. 6, c. 28), ss. 4, 6, 41—Trunk Roads (Delegation of Powers) Order (Northern Ireland), 1949 (S.R. & O. 1949, No. 32).*

No more onerous duty is laid on the Ministry of Commerce as road authority under the Roads Act (Northern Ireland), 1948, than that to which the original highway authority was subject and therefore a person who suffers injury by reason of a defect in a trunk road has no right to recover when the negligence amounts only to a nonfeasance, and this is so even though the methods of enforcing the duty to repair which lay against a local authority, such as indictment and mandamus, are not appropriate procedures against the Ministry as a department of state.

The immunity of the Ministry in respect of nonfeasance extends to a County Council acting as agents for the Ministry under the Trunk Roads (Delegation of Powers) Order (Northern Ireland), 1949.

*Drake v. Bedfordshire County Council* [1944] K.B. 620 disapproved.

ACTION tried before Lord MacDermott L.C.J. and a special jury (2).

In January 1952 the plaintiff was riding a pedal cycle after dark on the main Newry to Dublin road when he was thrown from his cycle and sustained serious injuries owing to the presence of a pothole in the carriage way. The pothole in question had been filled with a mixture of stone chips and soil as owing to unsatisfactory weather conditions it was deemed impracticable to attempt a permanent patching. At the time of the accident the temporary filling had worked out of the hole and was scattered about the road surface. The plaintiff brought this action for

(1) In the Queen's Bench Division before Lord MacDermott L.C.J.: July 29, 30, Sept. 23, 1953.

(2) [This was the last case to be tried in the High Court of Justice in Northern Ireland with a special jury.—REPORTER].

damages for personal injuries caused by negligence and breach of statutory duty. The Lord Chief Justice withdrew the claim for breach of statutory duty from the jury but left the following questions on the issue of negligence :

(1) Was the accident caused by the plaintiff riding into a pothole on the trunk road described in the pleadings ? *Answer :* " Yes ".

(2) If the answer to (1) is " yes " was the nature of the pothole (unfilled) such as to create a danger for pedal cyclists using the road by night ? *Answer :* " Yes ".

(3) If the answer to (2) is " yes " ought the defendants to have been aware of the danger before the accident occurred ? *Answer :* " Yes ".

(4) If the answers to (1), (2) and (3) are all " yes " would the accident have happened if the pothole had been left as it was, that is to say, if the defendants had not filled it with chips and soil ? *Answer:* " Yes ".

(5) If the answers to (1), (2) and (3) are all " yes ", was the accident due :

(*a*) to the failure of the defendants to take reasonable care in the manner in which they temporarily repaired the pothole ? *Answer :* " Yes : we consider that the pothole should have been observed more carefully and filled more often ".

(*b*) to the failure of the defendants to take reasonable care in permitting the road to fall into disrepair ? *Answer :* " No ".

(6) Damages (Less £22) ? *Answer :* " £2,500 ".

The question was whether on these findings judgment should be entered for the plaintiff.

*Jones Q.C.*, *Agnew Q.C.* and *Rowland* for the plaintiff.

*Nicholson Q.C.* and *Lowry* for the defendants.

*Cur. adv. vult.*

Lord MacDermott L.C.J.: This action arises out of an accident which befell the plaintiff on January 16, 1952, as he was riding a pedal cycle on the main road leading from Newry to Dublin. The plaintiff was returning after dark to his home in Newry when he rode into a pothole on the carriage-way and was thrown from his machine, sustaining serious injuries. The accident happened at Cloghogue in the County of Armagh.

Before the Roads Act (Northern Ireland), 1948, (hereinafter referred to as "the Act of 1948") came into operation the road authority responsible for the upkeep of this part of the road was the defendant Council. At the time the plaintiff received his injuries, however, this road had been designated a trunk road by the Trunk Roads (Designation of Routes) (Northern Ireland) Order, which was made under section 1 of the Act of 1948, and the defendant Ministry had become, pursuant to the provisions of the same section, the road authority therefor. It is as such authority that the Ministry is sued in this action. Section 4 of the Act of 1948 makes provision for the exercise of functions in relation to trunk roads and subsection (1) thereof provides that:

> "Upon any road becoming a trunk road, then, in "relation to that road, all functions which im- "mediately before the road became a trunk road "were exercisable by any road authority as respects "roads and bridges, and any functions of con- "struction, maintenance, repair or improvement "exercisable as respects that road by a local "authority under any enactment shall, except as "otherwise expressly provided by this Act, be "exercisable by the Ministry to the exclusion of any "other authority; and all enactments relating to "those functions shall have effect accordingly, . . ."

Subsection (1) of section 6 of the same statute enables the Ministry to delegate by agreement any of its functions with respect to the maintenance, repair and improvement of a trunk road to a County, County Borough or Urban County District Council; and sub-

section (4) of the same section enacts that :

"For the purpose of securing continuity of "administration during the period of three years "following the thirty-first day of March, nineteen "hundred and forty-nine, the Ministry may, as soon "as may be after the passing of this Act, by order "provide that such of the functions of the Ministry "with respect to the construction, maintenance, "repair and improvement of, and other dealing "with, trunk roads, as may be specified in the order "shall be exercised by such councils and subject to "such conditions as may be so specified : . . . "

There does not appear to have been any delegation by agreement at the relevant time, but it will be observed that the accident happened within the period mentioned in subsection (4). The power thereby conferred was exercised by the defendant Ministry in respect of the road in question by the Trunk Roads (Delegation of Powers) Order (Northern Ireland), 1949, which I shall refer to as "the Delegation Order." Article 3 of this Order provides, inter alia, that each council shall, in relation to any trunk road situate in its area, exercise the functions set out in Part I of the First Schedule to the Order, and these include the "patching, gritting and siding and general upkeep of "the road surface". Article 4 should also be noticed. It provides that the councils in exercising the functions referred to "shall act as agents for the Ministry and in accordance with the conditions set out in the Third Schedule hereto". Of these conditions No. 8 is in the following terms :

"The Council shall in executing works and in "other dealings under this Order take all reasonable "precautions for the protection of public and private "interests as if the council were the road authority."

While it was conceded that this road was a trunk road within the meaning of the Act of 1948 and that the defendants were, respectively, the road authority and its agent by virtue of the enactments and orders to which I have referred, the effect of this legislation on the nature of the duty resting on each of the defendants as respects trunk road maintenance and on the plain-

tiff's claim for damages was vigorously disputed. This is a subject of general importance and I shall return to it after a reference to the issues and the findings of the jury.

The plaintiff in his statement of claim alleged not only negligence but breach of statutory duty. This latter plea was directed to the position of the defendant Council under the Delegation Order.

In my opinion the provisions of this Order were not intended to confer on an individual injured by reason of the state or condition of a trunk road any greater right to damages than would have been his when the council was the road authority. I think the main purpose of this Order was to define the functions and obligations of the councils as agents for the Ministry and I do not read it as creating any new cause of action or as seeking to modify or obliterate the long-established distinction between nonfeasance and misfeasance in this particular field. This aspect of the case is to some extent bound up with other considerations which must be discussed presently and I need not say more about it now except to add that for the reasons thus briefly stated I ruled, on the conclusion of the evidence, that it was unnecessary to leave any additional question to the jury on the plea of breach of statutory duty.

The defendants pleaded that the plaintiff had been guilty of contributory negligence. I was of opinion that there was no evidence in support of that plea fit to be submitted to the jury and I therefore declined to leave any question upon it.

I need not refer to the evidence at length. The material facts, in addition to those already stated, appear sufficiently from the jury's answers to the questions submitted.

[His Lordship considered the questions and the jury's answers and continued :]

I am satisfied that these findings sound entirely in nonfeasance and not in misfeasance. It is clear that the accident was caused by the pothole and not by what was put into it as a temporary filling. And it is,

in my opinion, equally clear that the failure to take reasonable care, as found by the jury in answer to question 5 (*a*), cannot be regarded as misfeasance. The lack of care lay not in what the council workmen did but in what they did not do. They should have watched better and filled the hole more frequently. The fact that they did not renew the temporary filling more often is, in my view, nonfeasance and no more. In this respect the case is very much on all fours with that of *Wilson v. Kingston-upon-Thames Corporation* (1), There an asphalt road had been repaired on two occasions by the highway authority, the second repair being of a temporary nature and consisting of putting tar-macadam into the hole. This wore or worked out and the plaintiff whilst cycling over the hole was thrown and severely injured. Morris J. (as he then was) held that this was nonfeasance. In the course of his judgment he said: "The injury to the plaintiff "was not caused by the exercise on the part of the "defendants of their duty to repair. It was not "because they effected some temporary repair . . . that "this accident happened. The accident happened "because the roadway was out of repair. Were I to "accede to the submission made on behalf of the "plaintiff, I would be not merely straining but also "going in the face of the established law on this "matter" (2). I respectfully agree and am quite unable to discern any material distinction between that case and the present one.

Now if this accident had happened while the defendant council was the road authority I have no doubt that, on these findings, it would have been under no liability to the plaintiff. It would have been protected by the well settled common law rule that no action will lie against a local authority for damages suffered by reason of mere nonfeasance in the repair of a highway committed to its care. It would have been under a duty to repair—a duty plainly recognised by section 82 (1) of the Local Government (Ireland) Act, 1898—but that is not a duty which enures for the benefit of an injured individual in the absence of some element of

(1) [1948] 2 All E.R. 780. (2) Ibid. 782.

misfeasance. Such is the law as recognised and confirmed by a long series of decisions of which I need only mention the following: *Cowley v. The Newmarket Local Board* (1); *The Municipality of Pictou v. Geldert* (2); *The Municipal Council of Sydney v. Bourke* (3); and *Harbinson v. Armagh County Council* (4).

The question which then arises is whether the defendant Ministry, as the road authority at the time of the accident can invoke the protection of the same rule of law or is otherwise entitled to a similar immunity. This involves a consideration of the Act of 1948 and, in particular, of subsection (1) of section 4 thereof. Now when that subsection is read with the aid of section 42—the definition section—so that "functions" includes not only powers but duties and "exercisable" includes what is to be performed, two things at least stand out clearly:—(1) Upon a road becoming a trunk road the duties of the former road authority as respects maintenance and repair are to be performable by the Ministry to the exclusion of any other authority, and (2) all enactments relating to those duties are to have effect accordingly. This second provision is expressed to be subject to Part IV of the Act and to certain modifications set out in the Second Schedule. These qualifications, however, contain nothing in point here, and so far as I can see subsection (1) of section 82 of the Act of 1898 must be regarded as applicable to the defendant Ministry in relation to trunk roads. I think, therefore, that the Ministry is under a statutory duty to keep its trunk roads in repair, but this, of course, does not of itself settle the present question. Looking to the text of section 4 the impression conveyed to my mind is that its main purpose was to put the new road authority in the shoes of the old as regards powers and duties, and if this is the view that ought to prevail I find it hard to impute to the legislature any intention of making a breach of the duties transferred result in quite different and much more onerous consequences for the Ministry than for the former road authorities.

(1) [1892] A.C. 345.
(2) [1893] A.C. 524.
(3) [1895] A.C. 433.
(4) [1902] 2 I.R. 538.

Regard must, however, be paid to two considerations bearing upon the nonfeasance rule which the draftsman may reasonably be presumed to have had in mind :— (i) The rule has not been applied heretofore to any but *local* authorities, and the Ministry, as a Department of State, stands outside this category ; and (ii) the recognised methods of enforcing the duty to repair in the case of a local authority, such as indictment and mandamus (as in *R.* (*Westropp*) *v. Clare County Council* (1)), are not appropriate procedures against the Crown.

In my opinion neither of these considerations affects the prima facie meaning of the text. While (i) may indicate that the rule as applied to the Ministry will have lost all contact with its origins, I cannot regard this as enough to affect the natural import of the language of the enactment. I think (ii) raises rather more difficulty, for if a person injured by a breach of the Ministry's duty to maintain a trunk road cannot recover I am not clear how otherwise the duty can be enforced. I need not, however, express any final view on the subject of enforceability as, even if the duty resting upon the Ministry is unenforceable by any other legal procedure, I do not think this circumstance would suffice to justify the inference that the legislature must therefore have intended to confer what would amount to a new right of action on injured persons. One likes to believe that where a legal duty is imposed there must be a legal right and a practical legal remedy, but in these days of an expanding legislative field, with the Crown acting in manifold capacities, I do not think one can lay down any general rule to that effect concerning the statutory duties of a government department.

Reference must also be made in this connection to the Crown Proceedings Act, 1947, and to section 41 (3) of the Act of 1948. With an exception which is not now material this latter enactment provides that nothing in the Act of 1948 " shall affect prejudicially any estate, " right, power, privilege or exemption of the Crown." The present effect of this saving on suits against the Ministry for misfeasance may not be what it was as the

(1) [1904] 2 I.R. 569.

Act of 1947 did not apply to Northern Ireland until after the passing of the Act of 1948, the application having been effected as from the 1st January, 1950, by the Northern Ireland (Crown Proceedings) Order, 1949. But, however that may be, I can see no doubt as regards the present effect of the saving on suits against the Ministry for nonfeasance. The immunity of the Crown in respect of this kind of breach of duty remains unaffected by the Act of 1947, because, as so applied, section 40 (2) (*e*) thereof provides that :—

> " Except as therein otherwise expressly provided, " nothing in this Act shall :—
>
> " (*e*) subject the Crown, in its capacity as a " highway authority, to any greater " liability than that to which a local " authority is subject in that capacity ".

I therefore conclude, both on the construction of section 4 of the Act of 1948 and on the provisions of that Act and of the Act of 1947, to which I have just referred, that the immunity which the defendant council enjoyed while it was a road authority by virtue of the nonfeasance rule is also enjoyed by the defendant Ministry.

There remains for consideration the question, whether, despite the enjoyment of such immunity by the defendant Ministry, the defendant Council is liable in negligence on the findings of the jury.

The argument for the plaintiff on this aspect of the case was on these lines : the Council, it was said, was under a duty to keep the road where the plaintiff was injured in repair and the answer to question 5 (*a*) is therefore a finding of negligence against it. The doctrine of nonfeasance does not apply, for that doctrine is only available to road authorities as such and the Council had ceased to be the road authority before the accident.

Now if this contention is sound the result, on the view I have already expressed concerning the position of the Ministry, would be that the action against it should be dismissed and that there should be judgment for £2,500 against its agent, the Council. In so far as

this result flowed from what is left of the general immunity of the Crown in actions of tort there would, I suppose, be nothing very novel about it. But in so far as it could be said to flow from the particular immunity accorded the Ministry, as road authority, by the nonfeasance doctrine it would, I think, create a highly anomalous situation. It would mean, in cases of true nonfeasance, that while the principal remained immune the agent was liable. It would also mean, if this accident had taken place before the Act of 1948, with the upkeep of the road in question committed by the Council to a contractor, that the latter would be liable alone. The contention under discussion is therefore one which, though plausible enough at first sight, deserves careful scrutiny.

I think it may be tested by leaving the complication of Crown immunity to one side for the moment and taking the case of a County Council's road contractor in the pre-trunk-road era. Had such a contractor a duty to individual users of the roads in his charge? As respects *acts* which caused danger he clearly had. What he did on the highway had to be done with due care. But was he liable in respect of omissions? On signing his contract he was liable therefor to the Council if the omissions were in breach of the terms he had agreed. But this gave road users no compensatory rights against him in respect of what he had failed to do, and I have not been referred to and am unaware of any authority deciding that road users had come to possess such rights in some other way. I do not forget the dicta of Cassels J. in *Drake v. Bedfordshire County Council* (1) to which Mr. Jones referred me. There the plaintiff's husband had been killed by falling on to a main road from a footpath which ran along that road at a higher level and was held to form part of it. He fell through a gap in the railings guarding the footpath which had been caused some years before by a motor vehicle striking the railing piers. At the material time the main road was a trunk road under the Trunk Roads Act, 1936, the Minister of Transport was the road authority therefor, and the defendant council was his

(1) [1944] K.B. 620, 626, 627.

agent by agreement for its repair and maintenance. The defendant council, in addition to other defences, contended that it was not liable for nonfeasance. Cassels J. held against the council. He said: "It is "contended on behalf of the defendants that at most "they were only guilty of a non-feasance. I decide "against the defendants on that point. I am satisfied "that this was a misfeasance, but the point only arises "if the defendants were the highway authority, and "they were not, and have said so. They do not "become a highway authority because they act under "a contract with a highway authority". And later he said: "If, however, the defendants were not the "highway authority, then the point of the distinction "between liability for non-feasance and misfeasance "does not arise". It is clear from these excerpts that the learned judge was prepared to hold that had the case been one of nonfeasance instead of misfeasance the plaintiff would still have succeeded in her claim for damages, the protection of the nonfeasance rule being no longer available to the council once it had ceased to be the highway authority. This view was plainly obiter but it is, of course, entitled to close consideration and it was, I observe, cited by the late Dr. Stallybrass in his last edition of Salmond on Torts, 10th ed. 276, in support of the proposition, "Nor "does the exemption [the nonfeasance rule] cover "contractors to a highway authority".

With all the respect that is due to those who have held this view, I am unable to accept it as applicable here or, indeed, as generally sound. The conclusion I have reached is that the defendant council in this case was no more liable, as agent, for the nonfeasance which caused the plaintiff's loss than it would have been as road authority. My reasons for this opinion may be enumerated as follows:—

1. I can find no satisfactory basis for the general proposition that the contractor to a road authority owes a duty to road users to take care as respects omissions which are truly of the nonfeasance type. The judgment in *Drake's* case (1) does not touch upon

(1) [1944] K.B. 620.

this fundamental aspect of the matter. I do not recall a claim in this country founded on such a duty, though one would think that if the duty existed it would have been resorted to frequently in order to circumvent the hardship which the nonfeasance rule has so often caused.

2. Where an agent is duly appointed to perform some function on behalf of a public authority he is, in general, entitled to share the immunities which the law confers on his principal. Thus, in *Young v. Davis* (1), a surveyor appointed under the Highway Act, 1835, was held protected by the immunity which the parish, whose officer he was, enjoyed under the nonfeasance doctrine. Other examples may be found in the relationship of the Crown and its agents. See, for instance, *The Brabo* (2), where the Minister of Supply and his agent, a British company, were both regarded as entitled to share the Crown's freedom from a particular statutory obligation. As Lord du Parcq said: "The statutes to which your Lordships were referred "do not bind the Crown. The Minister of Supply, "acting as agent of the Crown, cannot be sued success- "fully under a statute which does not bind the Crown. "This is in general equally true of any person who is "acting as 'a mere agent' of the Crown".

I do not suggest that this principle has not its exceptions. Where the relationship is statutory, for example, the relevant legislation may override or modify it. But whatever the exceptions may be I fail to see any justification for including the relationship existing between the present defendants amongst them. The agency here was compulsory, the terms and duties thereof were fixed and imposed, not by agreement, but by the Delegation Order, and the functions delegated were entirely of a public nature. In these circumstances why should the agent be subject to a form of liability in respect of which the principal has complete immunity? I have found nothing in the Act of 1948 or in the Delegation Order or elsewhere which supplies a satisfactory answer to this question.

(1) (1862) 7 H. & N. 760: (1863) 2 H. & C. 197.
(2) [1949] A.C 326, 355.

3. Lastly, and as already indicated, it seems to me that there is good ground for saying that the intention of the Delegation Order was to place upon the Councils no higher obligation to road users than that which they had previously borne as road authorities. The terms of condition 8, which are set out above, seem to me to point in this direction and, apart from that, it is impossible to think that in an Order of this nature any grave extension of the Council's previous liabilities would have been left to inference or imposed otherwise than in plain words.

On these grounds I hold that neither of the defendants is liable to the plaintiff, and that the action against both must be dismissed.

I wish to add that I have reached this conclusion with regret. The nonfeasance rule seems to me to be behind the times. It confers an unduly wide immunity in respect of negligent omissions, having regard to the gravity of the dangers which such omissions may cause; and the measure of relief produced by established exceptions has been obtained at the price of fine distinctions and consequent uncertainty. There was, no doubt, something to be said for the rule on grounds of expediency in the years that are past, and it may be that the time is not yet ripe for its complete abolition. But I venture to think that traffic conditions and the technique of highway engineering have to-day reached a stage which would justify the authorities concerned in considering whether it would not now be in the public interest to abrogate the rule in relation, at any rate, to trunk roads.

*Judgment for defendants.*

Solicitor for the plaintiff: *D. & E. Fisher.*

Solicitor for the defendants: *Chief Crown Solicitor.*

S.M.M.

## REGINA v. McGOOGAN (1).

*Practice—Criminal law—Refusal of bail—Vacation—Application to Divisional Court—Habeas corpus or substantive bail motion.*

A Divisional Court may be assembled in vacation to hear a bail motion when a prisoner has been refused bail by the vacation judge.

APPLICATION on notice of motion for a writ of habeas corpus ad subjiciendum treated by the court, as hereafter appears, as a motion for bail.

The applicant and three other persons were charged on September 1, 1953, with robbery and breaking and entering. The applicant pleaded not guilty: the three other persons pleaded guilty and gave evidence incriminating the applicant. All four were returned for trial at the Winter Assizes: the three other persons were released on bail, but the applicant was remanded in custody, his offer of bail having been refused.

On September 10, the prisoner appealed to Curran J. sitting as vacation judge against the order of the magistrate refusing bail. This appeal having been dismissed the prisoner, on September 14, applied to Curran J. under Order 84, r. 148 for a writ of habeas corpus directed to the Governor of the Belfast Prison. Curran J. refused to grant a conditional order or to direct service of a notice of motion under Order 84, r. 150, and the same day the prisoner applied to Porter L.J., who declined to make a conditional order but directed that notice of motion be served for hearing by a Divisional Court.

*Teevan* for the applicant.

*Brown* for the respondent.

LORD MACDERMOTT delivered the judgment of the court: This application comes before this Divisional Court because on an application for a writ of habeas

(1) In the Queen's Bench Division before Lord MacDermott L.C.J. and Porter L.J.: Sept. 24, 1953.

corpus ad subjiciendum Porter L.J. gave the prisoner leave to serve notice of motion.

There is no doubt that in point of law an application may be made by way of habeas corpus for the purpose of obtaining bail but that is a more complicated and expensive procedure and we think it better to treat this application as one to the Divisional Court for bail, the original bail motion having been refused by the vacation judge. It is quite clear that where an application for bail has been refused it is competent for a Divisional Court to consider the matter de novo, and there is no reason why a Divisional Court should not be assembled in vacation to hear a bail motion just as it may be assembled to hear a habeas corpus application.

We desire to say nothing whatsoever on the merits of the case against the applicant, James Boyd McGoogan. While we have to consider the circumstances which have been mentioned in the cases cited we are nevertheless of the opinion that the principal consideration is whether or not the applicant is likely to surrender to his bail if granted. The District Inspector said he had reason to think that the prisoner might not come forward to stand his trial. He is entitled to that opinion and it must be taken into account. But nevertheless we think that this is a case where it is right that the applicant should be given the opportunity of bail. He is a householder with a wife and children and, while undoubtedly there is a prima facie case against him, this court feels justified in taking the view that the case is not one in which bail should be refused.

We have proceeded on the basis that this is an application for bail and the order shall be drawn accordingly.

*Order accordingly.*

Solicitors for the applicant : *P. & J. Boyle.*

Solicitor for the respondent : *Crown Solicitor for the County of Antrim.*

S.M.M.

## ATKINSON v. STEWART AND PARTNERS Ltd. (1)

*Practice—Pleading—Particulars—Contributory negligence—R. S. C. Or.* 19, *rr.* 4, 7.

There is no rule of practice in the courts of Northern Ireland that a party pleading contributory negligence is in general under no liability to furnish particulars of the plea unless the party asking for them can make out a special case. The true test is whether in all the circumstances particulars of the plea are reasonably necessary to enable the other party to know the case he has to meet and so to save unnecessary expense and avoid allowing parties to be taken by surprise.

*Toppin v. Belfast Corporation* [1909] 2 I.R. 181 criticised and not followed.

APPEAL from an order of Sheil J. refusing a motion by the plaintiff for an order for further and better particulars of a plea of contributory negligence pleaded as a defence to a claim for damages for personal injuries arising from negligence and breach of statutory duty.

The plaintiff was employed by the defendants who carried on business as builders and contractors. On November 17, 1952, the plaintiff was carrying out repair work to a roof in the course of his employment when he fell to the ground and sustained severe personal injuries. In his statement of claim the plaintiff averred that his injuries were caused by the negligence and breach of statutory duty of the defendants. The particulars of breach of statutory duty set out ten different breaches of the Building Regulations (Northern Ireland), 1950, and several of them related to a roof ladder and complained of such matters as its construction, maintenance and inspection, and the failure to provide competent supervision during its erection. The particulars of negligence included the same ten heads and added four more, viz. failure to provide a safe place of work, failure to provide safe plant and appliances, failure to provide a safe system of work, and failure to supervise the work adequately

(1) In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.: Oct. 30, 1953; Feb. 22, 1954

In their defence the defendants denied negligence and breach of statutory duty and pleaded that "the "plaintiff was guilty of contributory negligence". A request for particulars of such contributory negligence was refused by the defendants' solicitors who stated: "As you are well aware a plaintiff is only "entitled to such particulars in special circumstances, "and to the best of our knowledge no such circum-"stances exist in the present case."

The plaintiff thereupon moved for an order compelling the defendants to furnish the required particulars. The motion was heard by Sheil J. who refused the order sought. The plaintiff now appealed to the Court of Appeal.

*Brown* for the plaintiff.
*Jones Q.C.* and *Blair* for the defendants.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J. stated the facts and continued:

At this stage it will, I think, be convenient to consider the relevant Rules of the Supreme Court and the purpose to be served in making an order for particulars. Order 19 deals with pleading generally and rules 4 and 7 thereof are important. These rules, in so far as material, read as follows:

"4. Every pleading shall contain, and contain "only, a statement in a summary form of the "material facts on which the party pleading relies "for his claim or defence, as the case may be, but "not the evidence by which they are to be proved, "and shall, when necessary, be divided into para-"graphs, numbered consecutively. . . .".

"7. A further and better statement of the nature "of the claim or defence, or further and better "particulars of any matter stated in any pleading . . . "may in all cases be ordered, upon such terms, as "to costs or otherwise, as may be just".

Nothing could be plainer or simpler than these provisions. Rule 4 remains the golden rule of pleading,

and the discretionary power of the court under rule 7 is wide and untrammelled by technicalities. It is exercisable in aid of the due administration of justice and its purpose may still be described with accuracy in the words of Cotton L.J. in *Spedding v. Fitzpatrick* (1), when he said : " The object of particulars is to enable " the party asking for them to know what case he has " to meet at the trial, and so to save unnecessary " expense, and avoid allowing parties to be taken by " surprise ".

With the principle thus settled and the rules as they are, it almost seems that one might hope to determine an application of this kind according to the particular facts and circumstances of the instant case rather than in the light of precedent. The practice has, however, been influenced by decision, and I must now refer to several of the cases which were cited in the course of the argument.

In *Martin v. M'Taggart Ltd.* (2) a Divisional Court (Lord O'Brien L.C.J., Gibson and Kenny JJ.) ordered further and better particulars of the pleas of contributory negligence and inevitable accident raised by the defendants in an action for damages for personal injuries alleged to be caused by the negligent driving of a motor car in the City of Dublin. The order made is set out in the report which, however, does not record any judgment. In the following year a similar application was refused by a Divisional Court (Gibson and Madden JJ.) in *Savage v. Kirk* (3). The proceedings there took the form of a running down action, the plaintiff alleging personal injuries due to the defendant's negligence in the driving of a motor car in the public street. The defence included a plea of contributory negligence on the part of the plaintiff. A short time before the application an action had been tried in which the defendant's sister had claimed damages for injuries sustained in the same accident. During the argument Gibson J. observed as follows : " This class of case " must always depend more or less on the special facts

(1) (1888) 38 Ch.D. 410, 413.
(2) [1906] 2 I.R. 120.
(3) (1906) 40 I.L.T.R. 82.

" of each case. The only general principle seems to be " that particulars will be given if, and only if, they are " necessary to prevent the plaintiff being taken by " surprise ". In the course of his judgment he said, after a reference to the earlier action : " Under the " circumstances of this case one would think that the " plaintiff would know the entire circumstances from " which a charge of contributory negligence could be " made out equally as well as the defendant. Where " the nature of the case is such that the particulars " of the negligence charged might be necessary to " prevent the plaintiff being taken by surprise, such " particulars should be ordered, but not otherwise ". And later, after speaking of railway accident cases, he added : " On the other hand, in an ordinary case of " crossing the street, I see no advantage in making such " an order, for all that the person on whom the order " was made can say is that the plaintiff did not mind " or keep a proper look out ". Then, speaking of counsel for the defendant, he said towards the end of his judgment : " I understand from Mr. Hanna that " he has at present no substantial case of contributory " negligence, and is relying on the cross-examination " of the plaintiff to establish such a plea. I think it " would be somewhat unreasonable to make such an " order as is asked for, and, under the circumstances, " it is not necessary for the protection of the plaintiff " to get these particulars ". *Martin v. M'Taggart Ltd.* (1) was cited in this case, as was also *Lynch v. Dublin, Wicklow and Wexford Railway* (2), a decision which went to the Court of Appeal. In that case the plaintiff, who had been injured alighting from a train, alleged that the defendants were negligent in that the carriage floor was dangerously high above the platform and the carriage and station were insufficiently lighted. The defendants denied negligence and pleaded contributory negligence. Kenny J. refused an application for particulars of this plea. He said that he did not

(1) [1906] 2 I.R. 120.

(2) (1901) 40 I.L.T.R. 83 (n) ; 1 N.I.J.R. 233.

think the plaintiff could be surprised and then he added : " The defendants state they are merely relying " on cross-examination to make out the plea. Particu- " lars were refused in *Patterson v. Dublin Tram Co.* (1) " which is on all fours with the present case, and to " give the particulars asked for here would be incon- " sistent with the decision in that case ". This decision was affirmed by the Court of Appeal but the report does not give more than the result of the appeal. I come next to *Toppin v. Belfast Corporation* (2), which was strongly relied upon by the present respondents, and which has undoubtedly had a considerable effect on the practice in Ireland and in this jurisdiction. There, again, the action arose out of a street accident. The plaintiff alleged that he had been knocked down and injured while crossing the street by the negligent driving of an electric tram which had approached at a high speed and without warning. The defendants denied negligence and pleaded inevitable accident and contributory negligence on the part of the plaintiff. A Divisional Court ordered further and better particulars of these pleas. The defendants then furnished particulars of the plea of inevitable accident, but appealed against so much of the order as directed them to give particulars of the plea of contributory negligence. The Court of Appeal (Sir Samuel Walker L.C., Fitzgibbon and Holmes L.JJ.) reversed the order of the court below, holding that the plaintiff had not made out " a " special case " for the order sought. The Lord Chancellor said : " We must follow our own decision " in *Lynch v. Dublin, Wicklow and Wexford Railway* " *Co.* (3), which decided that, unless in special cir- " cumstances, a defendant who has pleaded con- " tributory negligence will not be compelled to give " particulars of such a plea " (2). Fitzgibbon L.J., in concurring, also relied upon this earlier decision and added later : " I think ' a special case ' means one in " which the party can satisfy the Court that he is " likely to be taken by surprise by some accusation or

(1) (1898) 40 I.L.T.R. 83 (n) ; (3) (1901) 1 N.I.J.R. 233.
(2) [1909] 2 I.R. 181.

" evidence which may be brought against him, and " which he cannot be prepared to meet, unless he is " told of it beforehand ".

With great respect to the eminent judges who decided *Toppin v. Belfast Corporation* (1) in the Court of Appeal I must say I do not find it a very satisfactory decision. In the first place, the court purported to follow *Lynch*' case (2), but in it, as in *Savage v. Kirk* (3), counsel the defendants had indicated that they were relying merely on the results of cross-examination to make out the plea. That I regard as a circumstance which must have played an important part in these decisions. Once it is known that the party pleading contributory negligence is only doing so to take advantage of such evidence as he may succeed in obtaining from the plaintiff or his witnesses at the trial, the whole situation is changed. The plea no longer covers some specific act or omission of which the defendant intends or may intend to give evidence and the element of surprise passes out of consideration. And, secondly, while *Toppin v. Belfast Corporation* (1) has set up " a special " case " or " special circumstances " as the test to be applied before particulars are ordered, the judgments leave me in doubt as to what an applicant for particulars is expected to show in order to satisfy this test. Fitzgibbon L.J. places the onus clearly on the applicant. He is to satisfy the court " that he is likely to be taken " by surprise by some accusation or evidence . . . which " he cannot be prepared to meet unless he is told of it " beforehand ". But how is an applicant to say what is " likely " or what he cannot prepare against if the real trouble is that he does not know what case is going to be made against him ? Fitzgibbon L.J. appeared to think that the ordinary case of a collision between two road vehicles would not manifest " special circum- " stances ". It may well be in certain instances within that category that a plea of contributory negligence will not justify an order for particulars. Take, for

(1) [1909] 2 I.R. 181.
(2) (1901) 40 I.L.T.R. 83n.
(3) (1906) 40 I.L.T.R. 82.

example, the case of a plaintiff who has driven his car in broad daylight into the back of a stationary vehicle. The circumstances of such an accident might so limit the scope of a plea of contributory negligence as to make the possibility of surprise or embarrassment too remote to be taken into account. On the other hand, a collision on the highway between two vehicles may as readily be of a kind to justify the plaintiff in saying that the plea against him could cover so much that to avoid surprise and unnecessary expense he ought to know what case his adversary is going to make under it. Such a plaintiff will be required to give particulars of the negligence he alleges. Why in a case of this kind there should be an onus on him to show that he is *likely* to be taken by surprise before the defendant is ordered to give particulars of contributory negligence I am unable to follow. There may be nothing " special " in the sense of out-of-the-ordinary or unusual about such a case at all. The plaintiff may have no particular reason for anticipating that some point of which he is not aware will be made against him. But if the circumstances are not such as to fix the scope and practical content of the plea why should he not have particulars from the defendant? I do not suggest that the position between the parties to a suit is necessarily balanced or symmetrical as respects particulars. But the requirements of Order 19 rule 4 apply equally to claim and defence and I cannot but think that the effect of *Toppin v. Belfast Corporation* (1) has been to establish a practice which on occasion does not give this rule the respect that is due to it.

In my opinion the true test is not to ask if the applicant has made out " a special case ". It is to ask whether, having regard to the circumstances and character of the litigation, particulars of the plea in question are reasonably necessary to attain the objects mentioned by Cotton L.J. in *Spedding v. Fitzpatrick* (2).

Applying this test here takes one at once to the pleadings for there is little else in the way of relevant

(1) [1909] 2 I.R. 181. (2) (1888) 38 Ch.D. 410, 413.

material. I have already said enough of the statement of claim to indicate the general nature of the action. But it may be observed in passing that the laconic terms of paragraph 4, coupled with the copious particulars which are given, manifest an anxiety to keep everything open rather than to inform the defendants what exactly the plaintiff's case is going to be. It may be there is some special reason justifying this sort of pleading in this case. I do not know and I therefore refrain from further comment upon the terms of the present statement of claim. It is, however, certain that the tendency to plead in this manner has increased greatly of recent years and that the result has not, in general, been to clarify the real issues for determination. Indeed, it may fairly be said that the modern technique of particularising what may turn out to be the plaintiff's case as well as what is then thought (on such facts as have been ascertained at that time) to be his case, often reduces the system of written pleadings to an expensive farce in the more usual types of action. It is relevant to observe that this trend shows that the furnishing of particulars need not necessarily define the dispute or save expense by knitting the true issues, and I fully appreciate that, however critical one may be of *Toppin v. Belfast Corporation* (1), it has at least served to keep pleadings free from much useless and, at times, misleading verbosity. That, however, is the defect not so much of the system as of its abuse and this appeal must be decided in the light of the broad principles of pleading rather than in an attempt to reform the practice.

But, no matter how widely the plaintiff's case has been pleaded it is at least clear that it comes within the category of master and servant cases, that the plaintiff alleges he got injured while at work by a fall from a roof, and that at least part of his case is that his fall was caused by a broken roof ladder. In my opinion there is nothing in the case which automatically, as it were, tells the plaintiff what to expect from the

(1) [1909] 2 I.R. 181.

plea of contributory negligence. It could cover much in this sort of suit. From behind it the defendants could allege and seek to prove, for example, failure to obey instructions, failure to take due care to select a sound ladder, or carelessness in the use of the ladder. These, of course, are imaginary particulars used only to show that this plea does not define itself in this case. In these circumstances I see no reason why the plaintiff should not know what exactly is being alleged against him. If the defendants are only using the plea to cover what they may obtain from the plaintiff or his witnesses they can do what they have not done as yet and say so and the situation will be resolved. But if they intend to make a substantive case under the plea they should state the material facts on which they rely.

For these reasons I would allow the appeal.

PORTER L.J.: Prior to the Judicature Acts it was unnecessary for a defendant in an action like the present one to plead contributory negligence as a defence. Under the general plea of "not guilty" he was entitled to shew that there was contributory negligence on the part of the plaintiff. In Bullen and Leake, 2nd ed. (1863), p. 593, the position is stated as follows:

> "In actions for an injury caused to the plaintiff by "the defendant's negligence in doing an act, the plea "of 'not guilty' denies that the defendant did the "act, that he did it negligently, that the alleged "damage happened, and that it was caused by the "negligence. Under this issue the defendant may "show that the plaintiff caused the damage by his "own want of care, so that it was not attributable "to the act of the defendant."

Even when contributory negligence was pleaded, it was treated as a denial of the connection between the wrongful act and the alleged damage, and therefore as a traverse of an allegation in the statement of claim: *Rattray v. Cork and Macroom Railway Company* (1). In that case the widow of an engine driver claimed

(1) (1879) 4 L.R. Ir. 386.

damages under the Fatal Accidents Act, 1846, for his death, which was caused by the engine running off the railway line which was alleged to have been in a defective and dangerous condition through the negligence of the defendants. The defendants denied negligence and pleaded, (a) that the engine driver's want of care directly contributed to the accident, and (b) that the engine driver knew that the railway line was in a defective and dangerous condition and continued to act as driver, and that the defendants did not know that the line was defective and dangerous.

The case came before a Divisional Court (Palles C. B. and Dowse B.) on a motion to set aside the two paragraphs (a) and (b) as embarrassing. Palles C.B. said (1): "The long course of practice, therefore, "which in this country has established such a defence "as sufficient and unembarrassing applies with as much "force now as it did before the Judicature Act . . . [A "plea of contributory negligence] is in substance a denial "of the connexion between the wrongful act and the "damage sued for, and is therefore a traverse of an "allegation contained in the statement of claim . . . "It is necessary only to show a state of facts from which "the duty to use care arises, and a breach of that "duty. The statement of claim, by alleging that "Rattray was the person in charge of the engine, shows "that he was under an obligation to use due care, and "the allegation of negligence in the defence is a sufficient "statement of a breach of that duty".

Dowse B. said that this form of pleading contributory negligence had been adopted for many years and that he would look forward with fear to any change.

The plaintiff in the case was applying not for an order for particulars, but to set aside two paragraphs of the defence as embarrassing. It was however assumed in Ireland, not unreasonably perhaps, by those who were familiar with the former practice of pleading the general issue, that the case was an

(1) Ibid. 389.

authoritative decision against the right of the plaintiff to require and the duty of the defendant to furnish particulars of a plea of contributory negligence. Particulars could not be given of what was in substance a mere traverse.

The plea is far more than a denial or a traverse. It is a positive affirmation which combines both defence and counter-attack, and just because it is a positive affirmation it is well settled that the onus of proving it rests upon the defendant.

In Ireland there has been for many years great divergence of opinion on whether the defendant was bound to furnish particulars of the plea.

An application for particulars was granted by a Divisional Court consisting of O'Brien L.C.J. Gibson and Kenny JJ. in *Martin v. M'Taggart, Ltd.* (1), and a similar order was made in *O'Reilly v. McCall* (2) by a Divisional Court consisting of Palles C.B., Madden and Kenny JJ. On the other hand the application was refused by Gibson and Madden JJ. in *Savage v. Kirk* (3), by Murphy and Kenny JJ. in *Patterson v. Dublin Tramways Company* (4) and by Kenny J. in *Lynch v. Dublin, Wicklow and Wexford Railway Company* (5). In the last mentioned case counsel for the Railway Company stated that he was merely relying upon the cross-examination of the plaintiff, and the Court of Appeal affirmed the decision of Kenny J. (6). The last reported case on the subject is *Toppin v. Belfast Corporation* (7), in which the plaintiff who was knocked down by a tramcar as he was crossing the street claimed damages for negligence. By their defence the defendants denied negligence and pleaded inevitable accident and contributory negligence on the part of the plaintiff. On an application for particulars a Divisional Court (Gibson, Kenny and Dodd JJ.) ordered the defendants to furnish particulars of inevitable accident and of contributory negligence. The defendants appealed against so much of the order

(1) [1906] 2 I.R. 120.
(2) (1907) 42 I.L.T.R. 15.
(3) (1906) 40 I.L.T.R. 82.
(4) ibid. 83 (n).
(5) ibid.
(6) (1901) 1 N.I.J.R. 233.
(7) [1909] 2 I.R. 181.

as directed them to give particulars of contributory negligence. The Court of Appeal (Walker L.C., Fitzgibbon and Holmes L.JJ.) allowed the appeal and held that unless in special circumstances a defendant who has pleaded contributory negligence would not be ordered to give particulars of that plea. Walker L.C. said that the Court must follow their own decision in *Lynch's* case (1), and that he entirely concurred with the judgment of Palles C.B. in *Rattray's* case (2). Fitzgibbon L.J. concurring defined a special case as "one in which the party can satisfy the Court that he "is likely to be taken by surprise by some accusation "or evidence which may be brought against him, and "which he cannot be prepared to meet, unless he is "told of it beforehand." He said: "In the ordinary "case of a collision between two vehicles, where "negligence is alleged on the part of the defendant, and "contributory negligence on that of the plaintiff, the "only particulars which, speaking generally, the "defendant could give of the contributory negligence "would be to describe the occurrence, so as to show "that the plaintiff was more to blame than himself. "That is not 'giving particulars'" (3).

Now where the defendant accuses the plaintiff of contributory negligence I do not see why, without describing the accident, he cannot and should not state the particular act, behaviour or omission of the plaintiff which he alleges caused or contributed to the accident, for example, that he was driving at an excessive or dangerous speed, or on his wrong side of the road or without lights, or not keeping a proper lookout, or that he was drunk and incapable. I am inclined to agree with the opinion expressed by Gibson J. in *Martin's* case (4) when he said he could see no difference between particulars of negligence and of contributory negligence, and with due respect to the distinguished judges who constituted the court

(1) (1901) 1 N.I.J.R. 233.
(2) (1879) 4 L.R. Ir. 386, 388–9.
(3) [1909] 2 I.R. 181, 183.
(4) (1905) 40 I.L.T.R. 12, 13.

in *Toppin's* case (1), I think that the ruling in that case is at variance with the plain requirements of Order 19, rules 4, 5, 6 and 7. Every pleading must set out a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, and in cases of misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms particulars must be stated in the pleading.

It is not a compliance with the rules for the defendant to say that he is relying altogether upon the cross-examination of the plaintiff, or to reply, "You are as "well aware of all the circumstances as I am. You "know you were negligent, and you know in what "way your negligence caused the accident". The plaintiff may know all the circumstances, but his view of the accident is probably quite different from that of the defendant, and unless particulars are given, he can only speculate on what is the precise charge which the defendant intends to bring against him and would be therefore in the same embarrassing predicament as was the plaintiff under the former plea of the general issue. That was one of the matters which the rules of pleading were intended to remedy.

In the present case one can imagine a number of charges which might be brought against the plaintiff, for example, that he was working at a place where he had no business to be or that he was drunk at the time of the accident, or that he was disobeying the orders of the foreman, or that he was acting in breach of some regulation, or that he was not using a ladder which had been provided for the purpose. The evidence and the witnesses required by the plaintiff to disprove any one specific charge may and probably would differ from the evidence and witnesses required on one or more of the other charges. The object of furnishing particulars is to prevent surprise, to narrow the issues between the parties, and thus to save the

(1) [1909] 2 I.R. 181.

inconvenience and expense of producing witnesses whose evidence is not required to meet the precise charge.

The English practice is clearly set out in the Annual Practice, 1954, p. 340, under Order 19, rule 6 : " And " whenever either party is imputing fraud, negligence, " or misconduct to his opponent, the facts must be " stated with especial particularity and care. Thus, " in an action of wrongful dismissal, a plea justifying " the dismissal on the ground that the servant was " incompetent or dishonest must state the charge " specifically and in detail ; so must a plea justifying " the publication of defamatory words on the ground " that they are true; so must all charges of bad work- " manship, want of skill, negligence, and *contributory* " *negligence.*"

Prolixity ought to be avoided, and where a statement of particulars, which should be in a summary form, contains such a profusion of detail that it is embarrassing to the other party the costs of furnishing such a statement should be disallowed.

In my opinion the decision in *Toppin's* case (1) is inconsistent with our rules of pleading which are identical with the English rules, and the plaintiff is entitled to particulars of contributory negligence.

BLACK L.J. : I should have been content simply to express my concurrence with the judgments just delivered were it not that we are rejecting the view which has been widely held that it is a rule of practice in our courts that a defendant who in his defence alleges contributory neligence on the part of the plaintiff is generally under no liability to furnish particulars of that plea and will only be ordered by the court to give such particulars where the plaintiff is able to show the existence of some special circumstances. This supposed rule of practice is commonly regarded as having been definitely established by the

(1) [1909] 2 I.R. 181.

decision of the Irish Court of Appeal, in *Toppin v. Belfast Corporation* (1) in which it was undoubtedly laid down in terms by a strong court that a defendant will not be ordered to give particulars of a plea of contributory negligence unless the plaintiff makes out a special case for such an order. This has, I think quite legitimately, been interpreted as meaning that in an ordinary case a defendant is not bound to furnish such particulars and that a plaintiff who applies to the court for an order directing a defendant to give particulars of contributory negligence must show the existence of some special circumstances in the case in order to justify the making of such an order. Although the soundness of this alleged rule has been much canvassed in the profession the present is, so far as I am aware, the first case in which it has been challenged in this court.

The foundation of the liability of a party to furnish particulars of an allegation contained in his pleading is of course to be sought in the Rules of the Supreme Court. The relevant rules are rules 4, 5, 6 and 7 of Order 19. Rule 4 of this Order provides that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. Rule 5 enacts that the forms in Appendices C, D and E to the Rules when applicable, and where they are not applicable forms of like character as near as may be, shall be used for all pleadings, and the rule goes on to provide that where such forms are applicable and sufficient any longer forms shall be deemed prolix and that the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same as the case may be. Rule 6 directs that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid particulars (with dates and items

(1) [1909] 2 I.R. 181.

if necessary) shall be stated in the pleading. And rule 7 provides that a further and better statement of the nature of the claim or defence, or further and better particulars of any matters stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered upon such terms, as to costs or otherwise, as may be just.

The object of particulars is twofold, in the first place to limit the generality of the allegations in the pleadings and so to limit and define the issues to be tried, and in the second place, as stated in the oft quoted judgments of Cotton L.J. in *Philipps v. Philipps* (1), and *Spedding v. Fitzpatrick* (2), to enable the party asking for the particulars to know what case he will have to meet at the trial so as to avoid unnecessary expense and so that he will not be taken by surprise. The question whether in any individual case a party is to be held to be under a liability to deliver particulars of his pleading by reason of the provisions of the relevant rules of Order 19 must be tested and decided with reference to this twofold object and with reference especially to his obligation to let his opponent know the case which he has to meet.

In England the settled practice in an action of negligence is that the plaintiff should furnish the defendant with particulars of the acts or defaults which he alleges as constituting the negligence on which he relies. And the normal course appears to be that the plaintiff should not await a demand from the defendant before supplying these particulars but should set them out in his statement of claim. Thus in successive editions of Bullen and Leake the precedent of a statement of claim in an action of negligence contemplates that the allegation of negligence should be followed by particulars of the alleged negligence. And that this is the recognized practice in England

(1) (1878) 4 Q.B.D. 127, 139. (2) (1888) 38 Ch.D. 410, 413.

appears from the judgment of Goddard L.J. in *Baxter v. F. W. Gapp & Co. Ltd.* (1), in which he is reported as saying: "As a pure point of pleading, it is, of "course, right that, if a plaintiff is relying upon specific "matters in the way of negligence, or rather, asserting "matters as establishing negligence, those should be "pleaded as particulars of the statement of claim".

In Ireland on the other hand the courts were much less ready to take the view that the plaintiff in such an action should ordinarily be placed under a responsibility to furnish such particulars. I think there may have been a number of reasons for this different approach. In *M'Cabe v. Guinness* (2), a case decided upon the practice under the Common Law Procedure Acts, the Court of Exchequer had held that in an action founded upon negligence it was no objection, on a motion to set aside the plaint as embarrassing, that it contained only a general averment of negligence. In his judgment Palles C.B. says: ". . . In substance, "though not in form, this portion of the application "is one for further particulars. It is of the essence "of such an application that there should be an "allegation upon oath that the defendant has not "within his knowledge the further particulars which "he seeks. In the present case we have no such "allegation, and I am satisfied that the true facts "constituting the alleged negligence are as well known to the Defendant's advisers as they are to the "Plaintiff". The Irish Courts appear to have been disposed to adhere to this attitude after the Judicature Acts. Thus in *Joynt v. Jackson* (3) Palles C.B. cites with approval the case of *Horlock v. Lediard* (4), in which the Court of Exchequer in 1842 had held that special grounds were always required as a reason for ordering delivery of particulars in a case of trespass. And throughout the Irish cases one finds recurring the view that an application for particulars must be grounded upon an affidavit making a case why such

(1) [1938] 4 All E.R. 457, 461–2.
(2) (1875) I.R. 9 C.L. 510, 513.
(3) (1880) 14 I.L.T.R. 55, 56.
(4) (1842) 10 M. & W. 677.

particulars should be ordered, and also the further view that particulars will not be ordered if the true facts of the case are known to the party applying.

This view that the plaintiff was not ordinarily under any liability to furnish particulars in an action of negligence found support in the fact that while the forms of statements of claim in actions of negligence contained in the Appendices to the Rules of the Supreme Court made provision for setting out particulars of the expenses alleged to have been incurred by the plaintiff they did not indicate in any way that particulars of the negligence complained of should also be set out (See R.S.C. Appendix C, Section V, Form 4, and Section VI, Forms 2 and 3). This is also of course true of the English forms from which the Irish forms were obviously copied. Another possible reason may have been one founded upon Order 19, rule 23, which provides that where it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred. The opinion appears to have been current in Ireland that negligence is a condition of the mind and that accordingly under the provisions of this rule it was sufficient merely to allege it without setting out any particulars of facts or circumstances grounding the allegation. This view is set out in the following terms in the notes to rule 23 in Wylie's Judicature Acts, (1906 ed.) p. 389 : " Negligence, that is, an omission to do something that " a prudent and reasonable man would do, or doing " something he would not do, sometimes called heed- " lessness, is properly a condition of the mind, and " therefore, in an action for negligence having set out " the facts from which a duty to use due care arises, " it will be sufficient, according to this rule, to allege " as a fact the negligence or want of care of the " defendant, with reference to those facts, " without setting out the circumstances from which " the same is to be inferred ". This note in Wylie reproduces word for word a note in Eiffe's Judicature

Acts (1881), p. 322, on the then Order 18, rule 16 which corresponds to the present Order 19, rule 23. I am afraid that the view expressed in the note would not nowadays be accepted as sound. It dates from a time when it was customary to regard negligence merely as a mental ingredient in tort and before it was appreciated that negligence is in reality a specific tort in itself consisting simply of a breach of a legal duty to take care resulting in damage to the complainant (*Grant v. Australian Knitting Mills Ltd.* (1) per Lord Wright), and that in deciding whether a person has been guilty of this tort of negligence the standard of his legal duty is not a mental one but a purely objective one. "The "question for judges and juries is not what a man was "thinking or not thinking about, expecting or not "expecting, but whether his behaviour was or was not "such as we demand of a prudent man under the given "circumstances" (Pollock on Torts, 14th ed., p. 350). Or as it was tersely put by a writer in the Harvard Law Review quoted in the recent editions of Pollock on Torts and Salmond on Torts: "Negligence is "conduct, not a state of mind". I cannot but think, however, that the note in Eiffe and Wylie, the standard works on Irish practice, may have had considerable influence upon the attitude in this country to particulars in cases of negligence. However this may be one gathers from Fitzgibbon L.J.'s judgment in *Toppin's* case (2) that even in 1909 the view of the Irish courts was that a defendant had to make out a special case before he could require the plaintiff to furnish particulars in a negligence action. He says: "There are "special cases where the plaintiff might be required "to give particulars of the alleged negligence, as, for "example, where the defendant proves that he knew "nothing of the alleged occurrence, or was unaware "that anyone was hurt, until the service of the writ".

In the courts in Northern Ireland the practice until 1941 was to frame statements of claim so as merely to allege negligence in general terms as is done in the forms in Appendix C to the rules. In practically

(1) [1936] A.C. 85, 103. (2) [1909] 2 I.R. 181, 183.

every case however the defendant served a notice upon the plaintiff requiring particulars of the alleged negligence and this notice was invariably complied with. I think that it was tacitly recognized that in almost every negligence action the defendant was entitled to be given particulars of the negligence alleged for the purposes indicated by Cotton L.J. in *Philipps v. Philipps* (1), and *Spedding v. Fitzpatrick* (2), and that it was apprehended that our Courts would follow the English practice and order such particulars to be furnished. About 1941 however, the practice changed and it is now usual in an action for negligence or breach of statutory duty to set out at length in the body of the statement of claim particulars of alleged acts and defaults which are asserted and put forward as establishing the negligence or breach of statutory duty. I understand that this change in practice was brought about by a ruling of Andrews L.C.J. and that it received a certain stimulus by the addition in July 1941 to Order 19, rule 6, of the words : " Any pleading which " does not comply with this rule may be struck out ". A statement of claim framed in accordance with this present practice will in form at any rate comply with the requirements of rules 4 and 6 of Order 19, and if properly drafted will serve the object of defining and limiting the issues and informing the defendant of the case that he is called upon to meet. Unfortunately however, as the Lord Chief Justice has pointed out, we not infrequently meet pleadings nowadays containing in the guise of particulars long and assorted lists of allegations of negligence the majority of which are not even attempted to be substantiated at the trial and are indeed shown by the evidence to be wholly devoid of foundation. Pleadings framed in this way, so far from serving the objects of particulars, are calculated to embarrass the fair conduct of the action. Judges ought not to be slow to deal with such pleadings by making special orders as to costs and in a specially bad case they may be forced to treat a pleading of this type as an abuse of the process of the court.

(1) (1878) 4 Q.B.D. 127, 139. (2) (1888) 38 Ch.D. 410, 413.

As regards giving particulars of contributory negligence the practice in England appears to be similar to the practice of furnishing particulars of negligence in the statement of claim. In the precedents of defences in Bullen and Leake the form of the plea of contributory negligence provides for the plea being followed by particulars of the contributory negligence and the same is the case in the precedents in Lord Atkin's Encyclopaedia of Court Forms and Precedents (see for example vol. XI pp. 149-150 and vol. XII pp. 63 and 102). In Ireland, on the other hand, the Court of Appeal in *Toppin v. Belfast Corporation* (1), following its previous decision in *Lynch v. Dublin, Wicklow and Wexford Railway Company* (2), decided that particulars of contributory negligence need not be given unless the party applying for the particulars makes out a special case for such particulars. While paying great respect to the decisions of the old Irish Court of Appeal this court has held more than once that we have jurisdiction to reconsider its decisions. Accordingly it is legitimate to turn to see the grounds upon which that Court based its decisions in *Lynch's* case (2) and *Toppin's* case (1). *Lynch's* case (2) is of no assistance in this respect as the report merely gives the decision of the Court of Appeal without the judgments. In *Toppin's* case (1), however the judgments of Walker L.C. and Fitzgibbon L.J. are reported in full while Holmes L.J. contented himself with expressing his concurrence with the other members of the court. Walker L.C. simply holds that the court must follow its own decision in *Lynch's* case (2) but goes on to say: "I have nothing to add to the judg- "ment of Palles C.B. in *Rattray v. Cork and Macroom* "*Railway Company* (3), in which I entirely concur". From this observation I gather that Walker L.C. found in *Rattray's* case (3) his support for the principle that a party pleading contributory negligence is not bound to give particulars of the plea unless a special case can be made out for such particulars. When *Rattray's* case (3) however is looked at it will be seen that it came

(1) [1909] 2 I.R. 181.
(2) (1901) 1 N.I.J.R. 233.
(3) (1879) 4 L.R. Ir. 386.

before the court on an application to strike out as embarrassing a defence of contributory negligence which had been pleaded without particulars and that it simply decided that the pleading rules under the Judicature Act allowed such a defence to be pleaded in the general form sanctioned by the authorities under the Common Law Procedure Acts without setting out in detail the particular facts in which the contributory negligence consisted. In other words it decided that a plea of contributory negligence in the general form was not demurrable. This might possibly be so. Nevertheless a pleading which was not demurrable might well be one of which particulars ought to be given under the rules. Moreover I do not think that all that Palles C.B. is reported as saying in *Rattray's* case (1) would be accepted without question at the present day. He says: "What is the nature of a "plea of contributory negligence? It is in substance "a denial of the connexion between the wrongful act "alleged and the damage sued for, and is therefore a "traverse of an allegation contained in the statement "of claim. It is true that the mode in which it dis-"connects the wrongful act from the damage is by an "averment of negligence on the plaintiff's part, which "contributed to the injury. To plead this negligence "it is necessary only to show a state of facts from which "a duty to use due care arises, and a breach of that "duty. The statement of claim, by alleging that "Rattray was the person in charge of the engine, shows "that he was under an obligation to use due care, and "the allegation of negligence in the defence is a "sufficient statement of the breach of that duty". It is of course true that as a general rule particulars will not be ordered of a mere traverse of an allegation contained in the statement of claim and no doubt under the old English practice before the Judicature Acts a defendant might raise a defence of contributory negligence under a general plea of "not guilty" (see

(1) (1879) 4 L.R. Ir. 386.

*Dublin, Wicklow and Wexford Railway Co. v. Slattery* (1). But I do not think that anyone nowadays would regard a plea by a defendant of contributory negligence as simply a traverse of the negligence alleged in the statement of claim. It is now firmly established that the burden of proof of a defence of contributory negligence lies upon the party raising that defence (see *Caswell v. Powell Duffryn Associated Collieries Ltd.* (2) per Lord Wright), and the question of whether a plaintiff has been guilty of contributory negligence is always treated as a separate issue from the question whether the defendant was guilty of negligence. A plea of contributory negligence appears in the forms of defence in Sections V and VI of Appendix D to the Rules and I conceive that nowadays where a defendant wished to rely on a defence of contributory negligence the court would require him to raise it specifically in his pleadings and would not regard it as covered by a mere traverse of the plaintiff's allegations. And if reliance is sought to be placed on the last sentence of the excerpt which I have quoted from Palles C.B.'s judgment (3) as authority for the proposition that an allegation of negligence contained in a defence is a sufficient plea and that no particulars should be ordered of such a plea it would seem logically to be equally good authority for the proposition that an allegation of negligence in a statement of claim is a good plea and that no particulars should be ordered of such an allegation in a statement of claim. Accordingly I cannot think that either what was decided or what was said in *Rattray's* case (3) provides satisfactory ground for the decision of the Court of Appeal in *Toppin v. Belfast Corporation* (4).

The second judgment in *Toppin's* case (5) is that of Fitzgibbon L.J. It begins by referring to the previous decision of the Court in *Lynch's* case (6) that an order for particulars of contributory negligence should not be granted unless the party applying made out "a

(1) (1878) 3 App. Cas. 1155, 1169, 1180, 1195.
(2) [1940] A.C. 152, 172.
(3) (1879) 4 L.R. Ir. 386, 389.
(4) [1909] 2 I.R. 181.
(5) [1909] 2 I.R. 181, 183.
(6) (1901) 1 N.I.J.R. 233.

" special case " for such an order. It then continues : " What Mr. Hanna insists upon as likely to cause " difficulty, namely—that some evidence may be " sprung upon the plaintiff for which he would not be " prepared, is a danger just as great against the " defendant as against the plaintiff, and the rule as " against a special case for giving particulars must " apply equally to both parties ". I readily agree that the same rule must apply equally to both parties. This appears to me to be in accordance with common-sense and with justice. And in the earlier case of *Martin v. M'Taggart Ltd.* (1), Gibson J. expresses the same view : " I can see no difference between parti- " culars of negligence and of contributory negligence ". Now that it is well established that no special case is required to be shown in order to justify a defendant requiring particulars of an allegation of negligence and when indeed such particulars are delivered almost as of course, the principle relied upon by Fitzgibbon L.J. that the same rule ought to apply equally to both parties must in the light of present day practice point to directly the opposite conclusion to that to which it led him in 1909.

After giving in the passage which I have already quoted the instances of special cases where a plaintiff might be required to give particulars of negligence, e.g. where the defendant proves that he knew nothing of the alleged occurrence or was unaware that anyone was hurt, Fitzgibbon L.J. proceeds to define " a special " case " as one in which the party can satisfy the court that he is likely to be taken by surprise by some accusation or evidence which may be brought against him and which he cannot be prepared to meet until he is told of it beforehand. These passages, by putting forward the fact that a party was ignorant of the happening of an accident as typical of the special case which would entitle him to call upon his opponent for particulars, seem inferentially to suggest that a party who was well aware of the true facts of the accident

(1) (1905) 40 I.L.T.R. 12, 13, [1906] 2 I.R. 120.

should not be entitled to demand particulars of the allegations of negligence made against him. This view is to be found emerging quite frequently in argument and occasionally in judgments in the reported cases. It seems to me a view which is obviously unsound. A party may be fully aware of the true facts of the case but he may be faced at the trial with witnesses giving a totally different account of the occurrence and telling a story which he never dreamt of and which he could easily have confuted if he had been prepared to meet it. The function of particulars is not to enlighten a party as to the true facts of the case. It is to let him know what case he will have to meet and, as Farwell L.J. said in *Elkington v. London Association for Protection of Trade* (1), to enable him to know what evidence he ought to be prepared with. It is with this function in mind that the question must be decided in any individual case whether it is a case in which particulars ought to be furnished.

It follows from what I have said that I do not find the judgments in *Toppin's* case (2) convincing. What is called contributory negligence of course differs from that negligence which constitutes a cause of action. In the latter case negligence consists of a breach of duty to the complainant to take care, but contributory negligence does not necessarily involve any breach of duty. It merely means that the conduct of the plaintiff was such as to show that he was not taking reasonable care for his own safety. But just as in the case of negligence constituting a cause of action so also in the case of contributory negligence the standard of conduct is an objective one and what is important is not the plaintiff's state of mind but the acts or omissions of which he is alleged to have been guilty. I see no tenable reason why for the purposes of the rules of Order 19 acts and omissions alleged to establish contributory negligence should be dealt with in a different way from acts and omissions alleged to establish negligence as a ground of action, or why it should be necessary to establish "a special case" in order to

(1) (1911) 27 T.L.R. 329. (2) [1909] 2 I.R. 181.

obtain particulars of contributory negligence. In my view every application for particulars of contributory negligence should be tested by the simple test of whether such particulars in that individual case are reasonably necessary to enable the plaintiff to know what case he will have to meet at the trial so as to avoid unnecessary expense and so that he will not be taken by surprise. In some cases possibly the circumstances may show that there is no necessity to order particulars. In some cases perhaps it may be necessary to resort to affidavits in order to decide whether an order should be made. In other cases it may appear from the pleadings themselves that the case is one in which particulars ought to be furnished. Each case will depend on its own circumstances. As regards the circumstances of the present case I entirely concur with what has been said by the Lord Chief Justice and I will resist the temptation to suggest further possible acts and omissions on the part of the plaintiff which the plea might conceivably cover. I agree that the case is one in which an order for particulars ought to be made.

*Appeal allowed.*

Solicitors for the plaintiff: *C. & H. Jefferson.*

Solicitors for the defendants: *McKinty & Wright.*

J. P.

## THE PRINCESS VICTORIA (1).

*Merchant shipping—Shipping casualty—Formal Investigation—"Wrongful act or default"—Merchant Shipping Act*, 1894 (57 & 58 *Vict.*, *c.* 60), *ss.* 466, 470, 475.—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 66.

A court of inquiry holding a formal investigation of a shipping casualty is entitled to make a finding of "wrongful act or default" if it is satisfied that there is a breach of legal duty of any degree which has caused or contributed to the casualty under investigation. It is not necessary that the act or default should be of such a nature as to warrant the description "criminal" or "quasi-criminal", nor in the case of a certificated officer is it necessary that it should be such as to merit the sanction of suspension or cancellation of his certificate.

Such a finding of "wrongful act or default" may be made against the registered owners or registered managers of a ship if the court is satisfied that the duty which was broken was a duty imposed by law directly and personally upon such persons, irrespective of the fact that they may not have been directly implicated in the acts or omissions which constituted the breach of duty. However, the mere fact that the owners or managers would be vicariously responsible in a civil action for the act or omission of another does not of itself warrant such a finding against them.

APPEALS pursuant to section 66 of the Merchant Shipping Act, 1906, by the British Transport Commission and by John Dudley Reed, the registered owners and registered manager respectively of the Motor Ship *Princess Victoria*, against certain findings contained in the report of a court directed by the Ministry of Transport to hold a formal investigation into the loss of the *Princess Victoria* and the loss of life consequent thereon.

The case is reported only insofar as it deals with the circumstances in which a court holding a formal investigation into a shipping casualty is entitled to make

(1) In the High Court of Justice in Northern Ireland before Lord MacDermott L.C.J. and three assessors appointed in accordance with the Shipping Casualties and Appeals and Re-hearings Rules, 1923 (S.R. & O. 1923, No. 752): Sept. 29, 30, 31, Oct. 1, 4, 5, 6, 7, 8, 11, 12, Nov. 26, 1953.

findings that the casualty was caused or contributed to by wrongful acts or defaults on the part of the registered owners, registered managers, or other persons.

The Motor Ship *Princess Victoria* was built for and used on the cross channel services of the British Transport Commission and plied between Larne and Stranraer. One of her functions was that of a car ferry, and her main freeboard deck was the car deck, to which access was gained by means of an aperture in the stern of the vessel and an open corridor seventeen feet wide. In the ordinary course the aperture in the stern of the vessel was closed while the vessel was at sea by two steel doors five feet six inches in height (hereinafter referred to as " the stern doors ").

On the morning of January 31, 1953, the *Princess Victoria* left Stranraer on a voyage to Larne carrying 127 passengers, a crew of 49, and some cargo which was stowed on the car deck. At the mouth of Loch Ryan the ship encountered a severe gale, and the heavy seas stove in the stern doors and flooded the car deck. The vessel developed a list to starboard which persisted and increased, and she capsized and sank some hours later off the coast of Northern Ireland with heavy loss of life.

The Ministry of Transport directed the holding of a formal investigation into the loss of the ship and the loss of life consequent thereon, and the investigation was held in Belfast by a court of summary jurisdiction consisting of a resident magistrate and three assessors appointed in accordance with the provisions of section 466 of the Merchant Shipping Act, 1894.

The report of this court furnished to the Ministry contained, inter alia, the following findings :

(i) that the sea which broke open the stern doors was not exceptional.

(ii) that the *Princess Victoria* was not seaworthy when she left Stranraer.

(iii) that the freeing arrangements for water which had accumulated on the car deck were not adequate.

(iv) that the stern doors were not of adequate strength for the Larne-Stranraer passage.

(v) that the loss of the *Princess Victoria* was caused by the default of the owners and managers in the following respects :

(*a*) in that they failed to provide stern doors sufficiently strong to withstand the onslaught of the heavy seas which may be reasonably expected to occur from time to time in the North Channel.

(*b*) in that they failed to provide adequate freeing arrangements for seas which might enter the car space from any source.

(*c*) in failing to take precautionary steps after an earlier incident in November, 1951, when heavy seas had buckled the stern doors and the vessel had shipped some water.

(*d*) in failing to comply with the provisions of section 425 of the Merchant Shipping Act, 1894, in so far as they did not report the incident of November, 1951, to the Ministry of Transport.

The report of the court further found that the loss of life consequent on the sinking of the *Princess Victoria* was caused or contributed to by the owners and managers as set out in (v) above.

The registered owners and registered manager appealed against these findings.

*Nicholson Q.C.*, *Harrison Q.C.* and *Gibson* for the appellants, the British Transport Commission.

*Reid* for the appellant, John Dudley Reed.

*McSparran Q.C.*, *McVeigh Q.C.* and *McGonigal*; *Fox*; *Meenan*; for various trade unions representing persons on board the vessel and their estates.

*Topping Q.C.* and *Lowry* for the Ministry of Transport.

*Warnock A.-G.* and *Moody* for Lloyds' Register of Shipping.

*Hanna Q.C.* and *Blair* for the master and officers of the vessel, and their estates.

*Jones Q.C.* and *McQuitty* for William Denny & Bros. Ltd., the builders of the vessel.

*Murray* for Captain Perry, a former registered manager.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J. referred to the history and construction of the vessel and to the events which led up to the disaster. He affirmed the findings of fact that the sea which broke open the stern doors was not exceptional, that the stern doors were not of adequate strength for the Larne-Stranraer passage, and that the freeing arrangements for water which had accumulated on the car deck were not adequate. He then continued:

A lack of seaworthiness does not necessarily connote default, but it so often does that it is desirable, in the grave and unusual circumstances of this case, to treat these issues separately and to deal first with seaworthiness as a matter of physical fact. The immediate question, therefore, is whether the vessel as she lay at her berth at Stranraer on the morning of January 31, was fit in her construction to encounter the ordinary perils of the crossing for which she was then preparing. The expression "ordinary perils" has long been associated with investigations as to seaworthiness, but it is not to be limited, in this connection, to hazards that are commonplace or that lurk only in usual conditions. It also comprehends those worse than average blows and whims of the sea which may be expected of that element in conditions of wind and weather that are known or might reasonably be anticipated. On the conclusions already reached the stress of the seas on the stern doors was a natural, if not a common or inevitable, consequence of a fore-

seeable state of the weather with which the vessel should have been able to cope. This and the conclusion that these doors and the freeing arrangements were in fact inadequate to meet what happened mean, in the opinion of this court, that the *Princess Victoria* was unseaworthy in her construction on the occasion of her last journey. Whether her unseaworthy state was due to default is another matter and one to which consideration must now be given.

The findings of default are set forth in reply to Questions 47 and 48 which, with the answers given by the court below, read as follows :—

"Q. 47. Was the loss of the M.V. *Princess Victoria* caused or contributed to by the wrongful act or default of the owners, managers, master or any other person ?

A. The loss of the M.V. *Princess Victoria* was caused by the default of the owners and managers in the following respects : —

(*a*) In that they failed to provide stern doors sufficiently strong to withstand the onslaught of the heavy seas which may be reasonably expected to occur from time to time in the North Channel.

(*b*) In that they failed to provide adequate freeing arrangements for seas which might enter the car space from any source.

(*c*) In failing to take precautionary steps after the incident of November, 1951.

(*d*) In failing to comply with the provisions of section 425 of the Merchant Shipping Act, 1894, in so far as they did not report the incident mentioned in (*c*) above.

Q. 48. Was the loss of life consequent on the sinking of the M.V. *Princess Victoria* caused or contributed to by any wrongful

act or default of the owners, managers, master or any other person ?

A. By the default of the owners and managers as set out in answer to Question 47."

Much argument was directed to the proper import of the expression " wrongful act or default " as used in both these questions and it is desirable to reach a conclusion on this before going further.

This expression is employed in section 470 (1) (*a*) of the Merchant Shipping Act, 1894, which empowers the court holding a formal investigation to cancel or suspend the certificate of a master, mate or engineer if it finds that the loss or abandonment of, or serious damage to, a ship, or loss of life, has been caused by his " wrongful act or default "; and it is also to be found in section 66 of the Merchant Shipping Act, 1906,—the enactment under which the present appeals are brought—which provides for an appeal in certain cases where the investigating court has found that a shipping casualty has been caused or contributed to by the " wrongful act or default of any person." I think it may be assumed that Questions 47 and 48 were intended to echo the language of these sections in this respect, and that being so, the phrase must therefore be given its statutory meaning. This is really where the contention began, counsel for the appellants urging that the context of section 470 of the Act of 1894 and certain dicta in decided cases showed that only acts or omissions of such a serious nature as to justify the description of " criminal " or " quasi-criminal " and to merit, in the case of certificated officers, the grave sanction of suspension or cancellation, were comprehended ; while counsel for the respondent trade unions submitted that the expression signified any dereliction of duty, whatever its degree, and therefore included cases of mere negligence such as would suffice to found a claim in civil proceedings.

The authorities cited on this point seem to me to depend very much on their own particular facts and to afford little general guidance. Instead of reviewing

these decisions I therefore turn to the purpose and intendment of the relevant legislation. The underlying object is plain enough. It is to ensure, in the public interest, that shipping casualties will be adequately investigated and the material facts and causes ascertained and brought to light if possible. That process must necessarily include inquiry as to whether the casualty has been occasioned by some breach of duty, but I can see no reason why it should stop short in that direction at some undefined point in the scale of blameworthiness. It may be as important to reveal a breach of duty that is not in any way gross or heinous as one that is. The degree of culpability may, of course, be of moment, as in cases where the penalty of cancellation or suspension can be inflicted; but section 66 clearly contemplates findings of default against persons who are not certificated officers and the power to impose the penalties mentioned on those who are, affords no sound ground for restricting the expression "wrongful act or default" to conduct which ought to be punished. The ordinary, natural meaning of the words holds nothing to suggest such a limited interpretation. In my opinion neither the policy nor the text of the legislation calls for any modification of that meaning and I therefore conclude that the proper connotation of "wrongful act or "default" is a breach of legal duty of any degree which causes or contributes to the casualty under investigation.

A further point on the scope or ambit of the expression "wrongful act or default" must now be considered. Do these words relate only to those persons who are themselves actually in default, or do they extend to include those or some of those who are responsible in law for the acts or omissions of the actual defaulters? Counsel for the Commission submitted that if there was a finding of default it should be limited to the actual defaulter. His default, it was said, should not, for the purposes of an investigation of this kind, be imputed to any person in authority over him, either as principal or employer, unless full knowledge of all the material facts had been brought

home to that other person. And this, the argument proceeded, meant that default on the part of a manager or other officer or servant of the Commission would not justify a finding against the Commission in the absence of evidence showing that someone at the very heart of this corporation, its *alter ego* as he was called, had personal knowledge of all the relevant circumstances. Put shortly, this submission comes to saying that in this case the Commission cannot be found in default unless personal default is proved against some member of the Railway Executive.

The submission advanced by counsel for the trade unions went almost as far in the opposite direction. "Default", they contended, embraced all who were in law responsible for the default, no matter how vicarious that responsibility might be. Accordingly, if actual default contributing to the disaster were found against any officer or servant of the Commission that was default on the part of the Commission, irrespective of the nature of the duty in question.

In my opinion both these views are too sweeping to be sound. No difficulty arises as respects a finding against an individual who has been personally guilty of a breach of duty. The controversy lies beyond him and involves those for whom he has been acting; and there it is, I think, necessary to differentiate between two well recognised categories of default. In the first, the duty breached by the default rests directly and personally upon the defaulter's employer, be he a natural or an artificial person and cannot be got rid of by any process of delegation. This type of duty I shall refer to as "personal" for lack of a better description. In the second, the duty breached by the default is not personal in this sense, but the actual defaulter's breach is imputed to the employer vicariously and so as to render him liable in damages for the default.

This second category depends on a rule of law for settling liability for wrongful acts or omissions which is founded on the maxim *qui facit per alios facit per se*

But as I read the enactments governing the holding of investigations into shipping casualties they have nothing to say to questions of liability. They are concerned with causes rather than with matters of compensation. For this reason it seems to me that, for the purposes of these proceedings, default within the second category may be left out of account.

What, then, of default in the first category, that is to say, of default which is the breach of what I have called personal duty? For the Commission, Mr. Nicholson contended that it was not enough, in order to justify a finding of default against the Commission, to prove a breach of duty personal to them as owners, and in support of this proposition he referred to the decision of Willmer J. in *The Truculent* (1), and of Sellers J. in *Beauchamp v. Turrell* (2). In their material aspects these decisions were directed, not to "wrongful act or default" but to the scope of the words "actual fault or privity" contained in section 503 (1) of the Act of 1894 which provides for limitation of liability in certain events; and in both it was held that the breach of a personal duty resting on ship owners did not necessarily involve a finding of actual fault or privity. I am not sure that this view is altogether reconcilable with that expressed on the same subject by Lord Haldane in *Standard Oil Company of New York v. Clan Line Steamers, Ltd.* (3). But, however that may be, I think it is impossible to treat these expressions as equivalents and to argue from one to the other. The sections in which they occur relate to very different subject matters, and it seems to me that if I were to apply the cases cited by Mr. Nicholson I would be ignoring at least one obvious implication of the use of the phrase "wrongful act or default" in relation to shipping casualties. If, as I have held, that phrase signifies a breach of legal duty, whatever its degree, why should it not embrace a breach of duty personal to the owners irrespective of where or how within their undertaking the breach was caused? I

(1) [1952] P.1.
(2) [1952] 2 Q.B. 207.
(3) [1924] A.C. 100, 113.

have found no convincing answer to this question. It may be very important, in the public interest, to ascertain if the owners have, in fact, discharged the obligations placed personally and directly upon them by law. The words used do not exclude inquiry to that end, nor, in my opinion, does the policy of the enactments in which they are to be found. Whatever else may be said, I am clear it was never the intention of the legislature that the court investigating a shipping casualty should have to wander about inside the organisation of a public authority, such as the Commission, in order to find whether a breach of duty personal to it was default on its part. My conclusion, therefore, is that default, in the sense of a breach of personal duty, is within the scope of the expression " wrongful act or default " and may be found against the owners once the personal nature of the duty and its breach are established.

[His Lordship proceeded to consider whether, in the light of the foregoing, any wrongful act or default causing or contributing to the casualty on the part of the appellants had been established. His conclusions thereon were as follows :

(i) that while the owners of the ship had taken reasonable care to provide a seaworthy vessel at the outset and had duly maintained her, they ought to have appreciated before the date of the disaster that she was not a safe vessel for use on the service between Larne and Stranraer in all weathers, particularly in view of an incident which had occurred on an earlier occasion and which tended to throw doubt on her seaworthiness for that service ; and accordingly that the owners were in breach of the duty imposed on them at common law to provide a seaworthy vessel.

(ii) that since the appellant Reed had taken over the duties of manager of the vessel subsequent to the earlier incident and was not shown to have been aware of the circumstances relating to it, it had not been established that he was in breach of

his duty to take care to see that the vessel was seaworthy.

(iii) that it had not been established that there had been any breach of the relevant statutory duties.]

*Appeal of the appellants, the British Transport Commission, dismissed, subject to certain modifications of the findings against them. Appeal of the appellant, John Dudley Reed, allowed.*

Solicitors for the appellants, the British Transport Commission : *O'Rorke, McDonald & Tweed.*

Solicitors for the appellant, Reed : *C. & J. Black.*

Solicitors for the trade unions : *F. Hanna; Moorehead & Wood; D. P. Marrinan.*

Solicitors for the Ministry of Transport : *Carson & McDowell.*

Solicitors for Lloyds' Register of Shipping : *Johns, Elliott, Wallace & Co.*

Solicitors for the master and officers : *McKinty & Wright.*

Solicitors for the shipbuilders : *C. & H. Jefferson.*

Solicitors for Captain Perry : *S. & R. Crymble.*

J. P.

## NEWTOWNARDS RURAL DISTRICT COUNCIL v. McCULLOUGH (1).

*Public Health—Temporary building—Moveable vehicle adapted for use as a dwelling—Public Health Acts Amendment Act,* 1907 (7 *Edw.* 7, *c.* 53), *s.* 27.

A structure such as a caravan or omnibus adapted for use as living accommodation is capable of constituting a temporary building for the purposes of section 27 of the Public Health Acts Amendment Act, 1907, notwithstanding that it is fitted with road wheels and brakes and can be moved from place to place by towing.

In determining whether such a structure does constitute a temporary building the intention with which it was set up is a relevant consideration, and if it was set up with the intention that it should be used as a dwelling for an indefinite period it should be regarded as a temporary building.

While the question whether such a structure constitutes a temporary building involves a question of fact, the Court of Appeal will interfere to correct the decision of the lower court if it is satisfied that the lower court has misdirected itself and reached a conclusion which is not reasonably warranted by the facts as found.

CASE STATED by the County Court Judge for the County of Down.

The respondent in this appeal was charged at Donaghadee Petty Sessions upon a summons which alleged that he being the owner of a temporary building at Turkington's Field, Ballyferris in the County of Down and having been served with a notice requiring him to remove the said temporary building which had been erected without prior application as required by section 27 of the Public Health Acts Amendment Act, 1907—to the Local Authorities for permission so to do had failed and neglected to remove the said building, contrary to that section. The resident magistrate convicted the respondent, who appealed to Quarter Sessions.

The following facts were found by the county court judge :—

(1) In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.: Oct. 27, Dec. 21, 1953.

(i) that the respondent brought to Turkington's Field, Ballyferris the alleged temporary building without having applied to the Council for permission so to do.

(ii) that the Council had duly required the respondent to remove the said alleged temporary building.

(iii) that the respondent had failed to remove the said alleged temporary building.

(iv) that the alleged temporary building had been a motor omnibus of the double decker type; it was brought to Turkington's Field for the purpose of use as a dwelling and for no other purpose; as situate in Turkington's Field, it was without any engine and was not mobile under its own power; the structure was fitted with a hand-brake and a foot-brake which were capable of acting and it had wheels with inflated tyres; no towing bar was fitted; the alleged temporary building was owned by the respondent at all material times.

(v) that the alleged temporary building was used by the respondent and his family as a dwelling for prolonged periods and was adapted and fitted out for living purposes and was intended permanently to be so used, and it was the intention of the respondent to continue so using it; the respondent and his family had resided in it throughout the summer months of 1952 and it was originally brought to Turkington's Field for that purpose and with the intention that it should be used as a dwelling place; the alleged temporary building was capable of being adapted for towing and could, when so adapted be towed by tractor or lorry; the said alleged temporary building was brought at the end of May, 1951, to Turkington's Field; in July, 1951, it was moved from there to McNiece's Field at Ballywhisken two miles away and on June 30, 1952, was moved back to Ballyferris in each case as a dwelling for the respondent and his family and on each such movement it was towed by a lorry.

The county court judge held that since the alleged temporary building could be adapted for towing and

could be moved from place to place by towing and had in fact been towed by a lorry from Ballywhisken to Ballyferris and was not fixed or attached to the ground. it was not a temporary building within the meaning of the section. He further stated that had he been of opinion that the said alleged temporary building was a fixture in that it was fixed or attached to the ground he would have held it was a temporary building.

He accordingly allowed the appeal and reversed the conviction, but on the application of the Council stated this case for the opinion of the Supreme Court as to whether he had been correct in law.

*Jones Q.C.* and *Shaw* for the Council submitted that the reasons given by the county court judge showed that he had proceeded on a wrong principle, in that he had addressed his mind to what would constitute a permanent rather than a temporary building, and that on the facts, the only conclusion which could legitimately be reached was that the structure constituted a temporary building.

*McGrath* for the respondent submitted that the decision of the county court judge depended on a finding of fact, and that the court was bound by that finding.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J.: The question in this appeal is whether the respondent and defendant erected or set up a temporary building in Turkington's Field, Ballyferris, which is within the district of the appellant and complainant. If he did so, he undoubtedly contravened the provisions of section 27 (1) of the Public Health Acts Amendment Act, 1907, and was rightly convicted by the resident magistrate since he did not apply for the appellant's permission as thereby required. But if he did not do so, the decision of the learned county court judge reversing the order of the resident magistrate should stand affirmed, and the

question submitted for the opinion of this court should be answered in the affirmative.

Section 27 (1) of the Act of 1907 reads as follows :

" (1) Before any person erects or sets up a " temporary building he shall apply to the local " authority for permission so to do.

" The application shall be accompanied by a " plan and sections of the proposed building drawn " to a scale of not less than one inch to every eight " feet, and a block plan, drawn to a convenient scale, " showing the intended situation and surroundings " of the proposed building, together with a specifica- " tion describing the materials proposed to be used " in the construction of the building, and the purpose " for which the building is intended."

The earlier Public Health Acts did not give local authorities a sufficient measure of control over the construction of buildings that were temporary in character. Section 27 (1) was undoubtedly passed to meet this shortcoming, and it is therefore clear that the erection or setting up of a structure which is capable of being considered a building for the purposes of this enactment will not fall outside its provisions merely because the structure itself exhibits some of the features or attributes of what is temporary in nature. Thus, a building which is easily removable because it adheres to the ground of its own weight and without other attachment, or because it is mounted on wheels, will not, by virtue of such facts alone, be outside the subsection, for those facts may be nothing more than the marks or badges of what is temporary.

This consideration, however, does not dispel the difficulties of the present case because the indications of what is temporary may be such as to raise the question that has been raised here, namely, whether the structure concerned is a " building " within the meaning of the subsection. That, unfortunately, is a question which cannot always be resolved by an investigation limited to a consideration of the physical features of what is said to constitute the " building ". The word " building " is not defined in the Act of 1907 and an exhaustive definition does not appear to be

possible. In its ordinary meaning it signifies a structure which affords some degree of shelter and which is therefore generally roofed either in whole or in part. But in this context it may signify more and involve the *purpose* which the structure serves or is intended to serve. Take, for example, a caravan made to be towed by a road motor vehicle and equipped as a dwelling for its owner and his family. Such a structure provides shelter and its construction can be shown by a plan and sections. From the point of view of its physical features it is capable of coming within section 27 (1). But if, in the course of a journey, its owner parked it, say in Turkington's Field as a place of rest for the night no one, in my opinion, would think of saying that he had erected or set up a building, either temporary or permanent. In such circumstances the caravan would remain a vehicle, a thing of passage, rather than become a building, as the term is used in section 27 (1). If, however, the owner thought he would like to live in Turkington's Field and decided to return and settle down there, using the caravan as his home, his change of purpose would be relevant and might be decisive in considering whether the caravan was now to be regarded not as a vehicle but as a building.

In cases of this kind, with intention an element to be considered, it is impossible to fix any hard and fast line between instances that are within and instances that are without this subsection. Cases which do not fall clearly on one side or the other but occupy a middle and debateable zone are commonly referred to as raising a question of fact and degree, and if this question is determined on evidence sufficient to support the finding the matter will be treated as one of fact rather than of law and the finding will not, in general, be disturbed.

The sort of question illustrated by the instance I have given of a caravan put to different uses is not new. I need not attempt any extensive survey of the cases, but the following reference to some of the decisions may indicate the nature of the problem and how it has been

approached. In *Richardson v. Brown* (1), the question arose whether a wooden structure of substantial dimensions which was brought along the street on wheels and placed at the corner of a new street was "a new building". A Divisional Court held that the justices were right in holding that it was, and in the course of his judgment Lord Coleridge C.J. said this (2): "The question is whether this is a new "building within the meaning of this Local Improve- "ment Act. The justices have sent us a photograph "of the structure, and the site, and when one sees this, "one can scarcely doubt it is a new building, and was "brought there on wheels. The main contention is "that because it had wheels, and was brought there "on wheels, it cannot be a building. I confess I see "no sufficient ground for this contention. It really "cannot matter whether there were wheels or not. The "question is for what purpose the building is there. "I think it was not at all intended to be used merely as "a caravan, but to all intents and purposes it is a house "or building, and is so used, and the wheels have been "adopted evidently with the intention of evading the "Act of parliament." In *Leicester Corporation v. Brown* (3), a large showcase, made of wood and glass, had been erected on the front of a photographer's house facing the street. The justices held that this structure was a building within the meaning of section 3 of the Public Health Act, 1888. The Queen's Bench Division refused to alter this determination. Towards the end of his judgment Pollock B. says (4): "One "must look to the circumstances in each case. Here "we have an erection of some dimensions, supported "on posts fixed into the ground, and fastened as fully "as it could well be to these posts. Its object is to "serve the trade of the occupier. Under all the cir- "cumstances, it seems to me to be a structure of such "a character as could be well termed a building. "Whether it is such, in fact, is a question for the "Justices to determine. They have so determined, "and I see no reason why their finding should be

(1) (1885) 49 J.P. 661.
(2) Ibid. 662.
(3) (1892) 62 L.J. M.C. 22.
(4) Ibid. 24.

"disturbed." And Hawkins J. observes (1): "If "the circumstances of the erection be such that two "persons might fairly take separate views whether it "were a building or not, then that is a matter for the "Justices to decide, and we cannot review their "decision." In *Andrews v. Wirral Rural District Council* (2), the structure was a two-roomed wooden dwelling which rested upon baulks of timber placed on the ground. Having been convicted for erecting it in breach of bye-laws made under section 157 of the Public Health Act, 1875, the builder sold the structure. The purchaser was then given notice by the defendant council to show cause why the building should not be destroyed, whereupon he raised the structure up, put it upon wheels and sold it to the plaintiff, who brought his action for damages after the defendant council had seized his purchase and taken it to pieces. The case came before the Court on Appeal on appeal from Atkin J. who had decided that as the structure was a new building under the Act of 1875 it could not, at the same time, be a temporary building under section 27 (1) of the Act of 1907. The Court of Appeal refused to adopt that view and held that the structure was a temporary building and had been set up contrary to the provisions of section 27. The following passage from the judgment of Warrington L.J. is to be noted: "As "to whether the building was a temporary building or "not, I should have been prepared to determine that "as it originally stood it was a temporary building; "but it is unnecessary to do that, because I am satisfied "that when it was set upon wheels and moved from "one place to another it must be regarded as a tempor-"ory building and as a temporary building then 'set "'up', to use the expression of the Act of 1907." (3). In *Ruislip-Northwood Urban District Council v. Lee* (4), the structures there in question consisted of the under carriages of vehicles of various types, such as floats, tramcars, buses and pantechnicons with superstructures

(1) Ibid. 25.
(2) [1916] 1 K.B. 863.
(3) Ibid. 874.
(4) (1931) 95 J.P. 164.

built for human habitation or the original bodies converted for the same purpose. All were used for residential purposes. MacKinnon J. held that these structures, or bungalow-caravans as they were described, were temporary buildings within the meaning of section 27 (1) and this finding was not disputed when the case was taken to the Court of Appeal on another point. This decision was followed by Humphreys J. in *Mitcham Urban District Council v. Seale* (1), which was concerned with caravans, converted omnibuses and tramcars that had been erected upon the defendant's ground and were used as dwellings. And lastly there is the decision of Hawke J. in *Gumbrell v. Swale Rural District Council* (2). There, two vehicles, still on their wheels, had been adapted for use for human habitation and had been so used from time to time. One was a bus and the other a motor lorry. It was held that the bus was, and that the motor lorry was not, a temporary building within the meaning of section 27 (1) of the Act of 1907. The learned judge appears to have distinguished between the vehicles on the ground that the bus had been brought to the site on which it rested for the purpose of affording dwelling accommodation, whereas the lorry, though adapted for living purposes, had not been brought originally to the site for that purpose. I am not sure that I altogether appreciate the nature of the distinction which was thus drawn, but this case, like the others I have cited, confirms the view that the purpose of the erecting or setting up is a relevant consideration.

I turn now to the facts of this appeal. The structure in question was a double-decker motor bus without an engine but still equipped with its road wheels, which were fitted with inflated tyres, and with foot and hand brakes which were capable of acting. No towing bar was fitted, but the structure was mobile in the sense that it could be towed on its wheels from one place to another. It was adapted and fitted out for living purposes. On these facts there is, in my

(1) (1933) 97 J.P. 295. (2) [1936] 3 All. E.R. 935.

view, no room for doubt that the structure was capable of being a " temporary building " within the meaning of section 27 (1) and of being " set up " as such.

It was brought to Turkington's Field for use as a dwelling for its owner, the respondent, and his family and for no other purpose. That is how it was used at all times material to this appeal, and, as the case adds, " it was the intention of the respondent to continue so " using it." That is all clearly found, and if the matter ended there I think it would be very difficult indeed to say that the structure was not a temporary building within the meaning of section 27 (1).

The facts as found, however, show, in addition, that the structure was not only mobile but was moved from time to time while in use for residential purposes. It was brought to Turkington's Field in May, 1951. In July of that year it was moved to a site two miles away ; and then, on June 30, 1952, it was moved back to Turkington's Field where it apparently stayed during that summer. The user as a dwelling continued throughout and each move was accomplished by having the structure towed by a lorry.

That the learned county court judge attached considerable importance to these movements and to the fact that the structure was not fixed to the soil appears from paragraphs 7 and 8 of the case stated, in which he says :

" 7. I was of the opinion that since it appeared " from the evidence given before me that the alleged " temporary building could be adapted for towing " and could be moved from place to place by towing, " and had in fact been towed by a lorry from Bally- " whisken to Ballyferris, as aforesaid, and was not " fixed or attached to the ground, it was not a " temporary building within the meaning of the " said Section, and I so held. I therefore allowed " the appeal and reversed the order of the learned " resident magistrate.

" 8. Had I been of the opinion that the said " alleged temporary building was a fixture in that

" it was affixed, or attached, to the ground I would " have held that it was a temporary building within " the meaning of the said Section and I would accord- " ingly have dismissed the Appeal and affirmed the " order of the learned resident magistrate."

Mr. McGrath, for the respondent, contended that the conclusion thus reached was a finding on a question of fact and degree which had evidence to support it and ought not to be interfered with by this court, even though it might have taken a different view.

I find myself unable to accede to this submission. It seems to me that the learned county court judge's reasoning might well have been unimpeachable had section 27 (1) spoken of " permanent " instead of " temporary " buildings, for the considerations he has stressed—mobility and lack of attachment to the ground—are just those that emphasize the temporary nature of the structure. In my opinion, the established facts do not offer any real scope for a choice between one conclusion and another. It seems to me they lead necessarily to the conclusion that, at the crucial period, this structure had lost all claim to be regarded as a conveyance. Its functions had ceased to be that of a vehicle and had become that of a building, a building no doubt on wheels and movable and therefore a temporary building, but still definitely and clearly a building.

For these reasons I think the question submitted for our consideration should be answered in the negative and the case remitted to the learned county court judge to proceed as to justice shall appertain.

PORTER L.J. : I concur and have only a few remarks to add.

Mr. McGrath for the respondent submitted that the question was one of fact, and that the county court judge having decided that the caravan was not a temporary building his decision ought not to be disturbed. In my opinion it is a mixed question of fact and law. The facts relating to the caravan must first be ascertained, and on the facts so found the court

must then determine as a question of law whether the caravan is a temporary building within the meaing of section 27 (1) of the Public Health Act, 1907. Having found the facts the county court judge said that if he had been of the opinion that it was a fixture in that it was affixed or attached to the ground he would have held it to be a temporary building, but since it was neither affixed nor attached to the ground he allowed the appeal and reversed the order of the resident magistrate.

That the question is one of mixed fact and law is clear. In *Hoddinott v. Newton, Chambers & Co., Ltd.* (1), the question arose whether an arrangement of planks and trestles used in the alteration of a building was "scaffolding" within the meaning of the Workmen's Compensation Act, 1897, section 7 (1). Lord Macnaghten said he agreed with Lord Brampton and Collins L.J. in thinking that the question whether a temporary staging was a scaffolding within the meaning of the Act was not a mere question of fact on which the finding of the county court judge was final, but was a mixed question of fact and law on which the Court of Appeal was entitled, and, as he thought, bound to express an opinion.

Whether a bicycle was a carriage within the meaning of the Highway Acts was treated as a question of law in *Taylor v. Goodwin* (2).

In *Fenton v. Thorley & Co., Ltd.* (3), the meaning of the word "accident" in the Workmen's Compensation Act, 1897, was discussed at length. Lord Lindley said "When personal injury and its cause or causes "have been ascertained the question whether such "cause or causes amount to an accident within the "meaning of the Act is a question of law on which the "decision of the county court judge is not final; and "is not a question of fact on which his decision is "not open to appeal. Upon this point I will only "remind your Lordships of the observations of Lord

(1) [1901] A.C. 49.
(2) (1879) 4 Q.B.D. 228.
(3) [1903] A.C. 443, 453

" Brampton in *Hoddinott v. Newton Chambers & Co.*,
" *Ltd.* (1), which were concurred in by the other noble
" Lords who heard the case, although they differed in
" the result."

In my opinion the county court judge misdirected himself on the point of law. There is nothing in any of the cases cited to suggest that a carriage, omnibus or a caravan on wheels fitted out as this one was as a dwelling for a month or two would not be a temporary building unless it was affixed or attached to the ground. I agree with the opinion expressed by Humphreys J. twenty years ago in *Mitcham Urban District Council v. Seale* (2), that it was then too late to argue that converted omnibuses, carriages and caravans used as dwellings were not temporary buildings within the meaning of the Public Health Acts Amendment Act, 1907.

The question should be answered in the negative.

BLACK L.J.: I concur in the judgment which has just been delivered by the Lord Chief Justice.

In modern times we frequently find caravans and superannuated omnibuses and railway carriages used as permanent or quasi-permanent dwellinghouses especially in seaside localities. It is not surprising that the question has often arisen whether such structures constitute temporary buildings within the meaning of that phrase as used in section 27 of the Public Health Acts Amendment Act, 1907, so that the approval of the local authority under that section must be obtained before they are erected or set up. It is unnecessary for me to refer in detail to the reported decisions of the Superior Courts on the section as the majority of them have been reviewed by the Lord Chief Justice in his judgment. The decisions establish that a superannuated vehicle may well be a temporary building erected or set up within the meaning of section 27. They also establish that in many cases the problem of whether a particular structure falls within the scope of section 27 is a question of fact and degree so that the determination of the justices on a prosecution under

(1) [1901] A.C. 49. (2) (1933) 97 J.P. 295.

the section will not be disturbed by the superior courts unless it can be shown to be founded on a wrong principle. But there are obviously cases in which only one conclusion could be justifiable. It would manifestly be wrong to hold that a caravan in which a summer holiday maker went on a week's tour, moving on to a different place every day, was a temporary building erected or set up by him within section 27. On the other hand it would equally be wrong to hold a structure such as an old omnibus or railway carriage to be outside the scope of the section where it is set up in a fixed position with the obvious intention of being used for years as a dwellinghouse.

The respondent's contention before this court was that the learned county court judge's decision was a decision of a question of fact by which this court was bound. The appellant's contentions were that the reasons given by the county court judge for his decision showed that he had proceeded on a wrong principle and that on the facts of the case the only conclusion which could be legitimately arrived at was that the respondent's omnibus constituted a temporary building within the meaning of that phrase as used in section 27.

The reasons given by the county court judge for his conclusion were first, that the old omnibus could be adapted for towing and could be moved from place to place by towing and had, in fact, been towed by a lorry from Ballywhisken to Ballyferris, and secondly, that it was not fixed or attached to the ground. Neither of these reasons is conclusive. That the omnibus was still mounted on its wheels and could be moved from place to place and had, in fact, recently been moved is of course a circumstance to be taken into consideration, but the reported cases clearly establish that this circumstance is far from being necessarily decisive. And I do not think that very great weight can be attached to the fact that it was not fixed or attached to the ground. A structure erected on the ground but not fixed or attached to it may well be a temporary building within the section. This is abundantly clear from the reported decisions. When one comes, however, to look at the facts of the case as set

out in the cases stated it appears to me that only one conclusion can be legitimately arrived at. The respondent's contention is that inasmuch as the old omnibus still has its wheels and tyres and can, in fact, be towed from place to place it is still a vehicle and cannot be said to have been set up as a temporary building. But although it was moved from Turkington's Field at Ballyferris to McNiece's Field at Ballywhisken in July, 1951, and back to Turkington's Field at Ballyferris at the end of June, 1952, it is found as a fact by the county court judge that it was brought to Turkington's Field for the purpose of use as a dwelling and for no other purpose, that it was without any engine and was not mobile under its own power, that it was used by the respondent and his family as a dwelling for prolonged periods and was adapted and fitted out for living purposes, and was intended permanently to be so used, and that it was the intention of the respondent to continue so using it, and that the respondent and his family had resided in it throughout the summer months of 1952, the hearing before the county court judge being in October, 1952. In considering whether or not a structure is a temporary building within section 27 it is legitimate in my opinion to have regard not only to the actual nature of the structure itself and to the use made of it but also to the purpose and intentions of the owner. Having regard to these matters as they appear from the facts set out by the learned county court judge I am of opinion that only one conclusion is possible on the admitted facts of the case, namely, that the omnibus had ceased to operate as a vehicle, that it had become a dwelling-house, that it had been set up as such in Turkington's Field to remain there as a dwelling house for an indefinite period, and that it falls within section 27 of the Act of 1907 as a temporary building erected or set up by the respondent.

*Case remitted.*

Solicitor for the Council : *J. Morris McKee.*

Solicitor for the respondent : *B. Campbell & Co.*

J. P.

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CUSTOMS—*Charge of dealing with uncustomed goods—No evidence of origin of goods or of unlawful importation—Onus of proof—Customs Consolidation Act*, 1876 (39 & 40 *Vict., c.* 36) *ss.* 186, 259.

Where a defendant is charged with being knowingly concerned in dealing with goods contrary to s. 186 of the Customs Consolidation Act, 1876, the complainant must prove that the defendant was knowingly concerned in dealing with the goods in question, but thereafter by virtue of s. 259 of that Act the onus is on the defendant to show that the duty in respect of the goods had been paid or that the goods were lawfully imported, or that they were not brought from a place outside the United Kingdom. B was charged on a summons which alleged that he had been knowingly concerned in dealing with a Ford motor car in contravention of s. 186 of the Act of 1876. A second summons charged a similar offence in relation to an Austin motor car. At the hearing no evidence was adduced by B who contended that the onus was on the complainant to prove that duty was due on the cars, or that they had been unlawfully imported, or that they were brought from a place outside the United Kingdom. *Held*, by the Court of Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ.), (i) that on the summons relating to the Ford car the evidence for the complainant was insufficient to establish that B was concerned in dealing with the car and accordingly no case was proved which would bring s. 259 into operation; (ii) that on the summons relating to the Austin car there was evidence which established that B was concerned in dealing with the car, and as B had contended that no offence was committed, a "dispute" existed for the purpose of s. 259 of the Act, and accordingly that section operated to cast upon the defendant the onus of proof on the issues referred to in the section. *R. (McBirney) v. Armagh J.J.* [1934] N.I. 212 and *R. (Magee) v. Down J.J.* [1935] N.I. 51 overruled. *Petty v. Biggerstaff* .. .. .. [C.A. 70


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HIGHWAY—*Road opened by contractor and improperly reinstated—Subsidence — Liability of highway authority and agents of highway authority—Misfeasance or nonfeasance.* A trunk road in respect of which the Ministry of Commerce was constituted road authority under the Roads Act (Northern Ireland), 1948, and which was managed by a County Council as agents for the Ministry was opened by a builder with the permission of the County Council for the purpose of laying water pipes. Owing to the faulty reinstatement of the road a subsidence occurred which caused personal injuries to the plaintiffs

*Held*, (i) that the builder was not a servant or agent so as to make either the Ministry or the County Council liable for his misfeasance; (ii) that neither the Ministry as highway authority nor the County Council as agents for the Ministry were liable for the nonfeasance of failing to see that the road was properly reinstated. *Downey and another v. Ministry of Commerce and Down County Council* [JUDGE OF ASSIZE 103

—— NON-REPAIR—*Ineffective temporary repair—Trunk road—Liability of highway authority and its agent—Roads Act (Northern Ireland)*, 1948 (12 & 13 *Geo.* 6, *c.* 28), *ss.* 4, 6, 41—*Trunk Roads (Delegation of Powers) Order (Northern Ireland)*, 1949 (*S.R. & O.* 1949, *No.* 32). No more onerous duty is laid on the Ministry of Commerce as road authority under the Roads Act (Northern Ireland), 1948, than that to which the original highway authority was subject and therefore a person who suffers injury by reason of a defect in a trunk road has no right to recover when the negligence amounts only to a nonfeasance, and this is so even though the methods of enforcing the duty to repair which lay against a local authority, such as indictment and mandamus, are not appropriate procedures against the Ministry as a department of state. The immunity of the Ministry in respect of nonfeasance extends to a County Council acting as agents for the Ministry under the Trunk Roads (Delegation of Powers) Order (Northern Ireland), 1949. *Drake v. Bedfordshire County Council* [1944] K.B. 620 disapproved. *Quinn v. Ministry of Commerce and Armagh C.C.* .. .. [Q.B.D. 131

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MERCHANT SHIPPING—*Shipping casualty — Formal Investigation — "Wrongful act or default"—Merchant Shipping Act*, 1894 (57 & 58 *Vict., c.* 60), *ss.* 466, 470, 475.—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 66. A court of inquiry holding a formal investigation of a shipping casualty is entitled to make a finding of "wrongful act or default" if it is satisfied that there is a breach of legal duty of any degree which has caused or contributed to the casualty under investigation. It is not necessary that the act or default should be of such a nature as to warrant the description "criminal" or "quasi-criminal", nor in the case of a certificated officer is it necessary that it should be such as to merit the sanction of suspension or cancellation of his certificate. Such a finding of "wrongful act or default" may be made against the registered owners or registered managers of a ship if the court is satisfied that the duty which was broken was a duty imposed by law directly and personally upon such persons, irrespective of the fact that they may not have been directly implicated in the acts or omissions which constituted the breach of duty. However, the mere fact that the owners or managers would be vicariously responsible in a civil action for the act or omission of another does not of itself warrant such a finding against them. *The Princess Victoria* [HIGH CT. 172

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*See* WILL—CONSTRUCTION 1.

MORTGAGE .. .. .. 1
*See* WILL—CONSTRUCTION 1.

NATIONAL INSURANCE BENEFITS .. .. .. 41
*See* NEGLIGENCE.

NEGLIGENCE—MASTER AND SERVANT—*Volenti non fit injuria—Contributory negligence—Law Reform (Miscellaneous Provisions) Act (Northern Ireland)*, 1948 (12 & 13 *Geo.* 6, *c.* 23), *ss.* 2, 3. In an action for damages for personal injuries caused by negligence the defendants pleaded volenti non fit injuria and contributory negligence. The trial judge declined to leave the issue of volenti non fit injuria to the jury, and on the issue of contributory negligence he told the jury that if they found that the plaintiff was guilty of negligence contributing to the accident they need not reduce the damages in exact proportion to the degree of negligence on the plaintiff's part. He also told the jury that in taking into account one half of the value of the rights referred to in s. 3 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, they need not deduct the full amount of such one half. *Held*, (i) the question raised by a plea of volenti non fit injuria is not whether the plaintiff consented to run the risk of hurt but whether he consented to the lack of care which may produce that risk, and that on the facts of the case there was no material on which a jury could find that the plaintiff had freely and voluntary assented to the risk of loss resulting from the defendants' lack of care falling upon him rather than upon the defendants; (ii) though s. 2 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, does not require that the claimant's share in the responsibility for the damage shall be settled in an arithmetical manner by describing it in terms of a fraction or percentage, yet if such a method is adopted the arithmetical measure cannot be departed from in assessing the amount by which the claimant's damages shall be reduced; (iii) the direction in s. 3 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, to "take "into account" one half of the value of the rights referred to in that section requires a deduction of the amount of such figure when ascertained. *Kelly v. Farrans Ltd* .. .. [C.A. 41

PARTICULARS .. .. .. 146
*See* PRACTICE—PLEADING 1.

—— *See* PRACTICE—PLEADING 2. 96

PLANNING — *Compensation— Award of arbitrator—Appeal—Notice of appeal —Form of hearing of appeal—Planning and Housing Act (Northern Ireland)*, 1931 (21 & 22 Geo. 5, *c.* 12), *s.* 46 (2). Where a statute provides a right of appeal but is silent as to the form of the appeal, the appeal takes the form of a complete rehearing. S. 46 (2) of the Planning and Housing Act (Northern Ireland), 1931, provides that a party named in an award of compensation by an arbitrator appointed

under the provisions of that Act who is dissatisfied with the amount of the award may appeal to the Supreme Court. *Held*, that since the section does not provide for any other form of appeal, the appeal under the section takes the form of a rehearing, and a notice of appeal which shows clearly that the party appealing is dissatisfied with the amount of compensation awarded need not further set out the grounds of appeal relied on. *Belfast Corporation v. Goldring* [Ch.D. 107

PRACTICE—COSTS—*Contributory negligence—Reduction of damages to amount within County Court jurisdiction—R.S.C. Or.* 65, *r.* 61 (42)—*Law Reform* (*Miscellaneous Provisions*) *Act* (*Northern Ireland*), 1948 (12 & 13 *Geo.* 6, *c.* 23), *s.* 2. A plaintiff whose damages are reduced by reason of contributory negligence to £100 or less is not, in the absence of special circumstances, entitled to more than half costs having regard to the provisions of Or. 65, r. 61 (42). *Kelly v. Stockport Corporation* [1949] 1 All E.R. 893 doubted and not followed. *Artt v. W. G. & T. Greer* (*a firm*) [Q.B.D. 112

—— CRIMINAL LAW—*Refusal of bail—Vacation—Application to Divisional Court—Habeas corpus or substantive bail motion.* A Divisional Court may be assembled in vacation to hear a bail motion when a prisoner has been refused bail by the vacation judge. *Reg. v. McGoogan* .. [Q.B.D. 144

—— PLEADING 1—*Particulars—Contributory negligence—R.S.C. Or.* 19, *rr.* 4, 7. There is no rule of practice in the courts of Northern Ireland that a party pleading contributory negligence is in general under no liability to furnish particulars of the plea unless the party asking for them can make out a special case. The true test is whether in all the circumstances particulars of the plea are reasonably necessary to enable the other party to know the case he has to meet and so to save unnecessary expense and avoid allowing parties to be taken by surprise. *Toppin v. Belfast Corporation* [1909] 2 I.R. 181 criticised and not followed. *Atkinson v. Stewart and Partners Ltd.* .. .. [C.A. 146

—— PLEADING 2—*Particulars—Personal injuries—Medical examination on defendant's behalf—Visible deformity.* In an action for personal injuries the plaintiff, who had averred that he had suffered substantial deformity of the right leg, was medically examined on the defendant's behalf. Subsequent to the examination the plaintiff was served with a notice requiring further and better particulars of the alleged deformity. *Held*, that the defendant was not entitled to further particulars of the deformity which should have been readily visible at the medical examination. *Patterson v. Donnell* .. [Q.B.D. 96

PUBLIC HEALTH—*Temporary building—Moveable vehicle adapted for use as a dwelling—Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 27. A structure such as a caravan or omnibus adapted for use as living accommodation is capable of constituting a temporary building for the purposes of section 27 of the Public Health Acts Amendment Act, 1907, notwithstanding that it is fitted with road wheels and brakes and can be moved from place to place by towing. In determining whether such a structure does constitute a temporary building the intention with which it was set up is a relevant consideration, and if it was set up with the intention that it should be used as a dwelling for an indefinite period it should be regarded as a temporary building. While the question whether such a structure constitutes a temporary building involves a question of fact, the Court of Appeal will interfere to correct the decision of the lower court if it is satisfied that the lower court has misdirected itself and reached a conclusion which is not reasonably warranted by the facts as found. *Newtownards R.D.C. v. McCullough* .. .. .. [C.A. 183

RATING .. .. .. .. 54
*See* VALUATION.

REVENUE—ESTATE DUTY .. 1
*See* WILL—CONSTRUCTION 1.

ROAD .. .. .. .. 103
*See* HIGHWAY.
——*See* HIGHWAY—NON-REPAIR. 131

STATUTES—
——Statute of Uses (Ireland), 1634 (10 Car. 1 sess. 2, c. 1), ss. 1, 7 .. .. .. 1
*See* WILL—CONSTRUCTION 1.

——Customs Consolidation Act, 1876 (39 & 40 Vict., c. 36), ss. 186, 259 .. .. .. 70
*See* CUSTOMS.

——Finance Act, 1894 (57 & 58 Vict., c. 30), s. 9 .. .. .. 1
*See* WILL—CONSTRUCTION 1.

——Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), ss. 466, 470, 475 .. .. .. 172
*See* MERCHANT SHIPPING.

——Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 54
*See* VALUATION.

——Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 66 .. 172
*See* MERCHANT SHIPPING.

——Public Health Acts Amendment Act, 1907 (7 Edw. 7 c. 53), s. 27 .. .. .. 183
*See* PUBLIC HEALTH.

——Rating and Valuation (Apportionment) Act (Northern Ireland), 1928 (18 & 19 Geo. 5, c. 30), s. 4 .. .. .. 54
*See* VALUATION.

——Planning and Housing Act (Northern Ireland), 1931 (21 & 22 Geo. 5, c. 12), s. 46 (2) .. .. .. .. 107
*See* PLANNING.

——Health Services Act (Northern Ireland), 1948 (11 & 12 Geo. 6, c. 3), ss. 5, 6, 11, 12, 80 .. 79
*See* HEALTH SERVICES.

——Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948 (12 & 13 Geo. 6, c. 23), s. 2 .. .. .. 112
*See* PRACTICE—COSTS.

—— ——ss. 2, 3 .. .. 41
*See* NEGLIGENCE.

——Roads Act (Northern Ireland), 1948 (12 & 13 Geo. 6, c. 28), ss. 4, 6, 41 .. .. .. 131
*See* HIGHWAY—NON-REPAIR.

——Belfast Corporation (General Powers) Act (Northern Ireland), 1948 (12 & 13 Geo. 6, ch. i), s. 50 (2) .. 122
*See* LOCAL GOVERNMENT.

STATUTORY RULES AND ORDERS—

——Health Services (General Dental Services) Regulations (Northern Ireland), 1948 (S.R. & O. 1948, No. 157) .. .. .. 79
*See* HEALTH SERVICES.

——Health Services (Services Committee) Regulations (Northern Ireland), 1948 (S.R. & O. 1948, No. 164) .. 79
*See* HEALTH SERVICES.

——Trunk Roads (Delegation of Powers) Order (Northern Ireland), 1949 (S.R. & O. 1949, No. 32) .. .. 131
*See* HIGHWAY—NON-REPAIR.

——R.S.C. Or. 19, rr. 4, 7 .. 146
*See* PRACTICE—PLEADING 1.

—— ——Or. 65, r. 61 (42) .. 112
*See* PRACTICE—COSTS.

TRUNK ROAD .. .. .. 131
*See* HIGHWAY—NON-REPAIR.

VACATION .. .. .. 144
*See* PRACTICE—CRIMINAL LAW

VALUATION — RATING — *Industrial hereditament — Egg-packing station — "Adapting for sale"—"Article"—Rating and Valuation (Apportionment) Act (Northern Ireland), 1928 (18 & 19 Geo. 5, c. 30), s. 4—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149* (1). Premises to which eggs are delivered in bulk for the purposes of testing, grading, stamping and packing, are premises used for the purpose of adapting articles for sale and are therefore an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928. *Commissioner of Valuation v. McAllister* .. [C.A. 54

VOLENTI NON FIT INJURIA.. 41
*See* NEGLIGENCE.

WILL—CONSTRUCTION 1—*Direction for payment of "death duties" out of residue—Some legacies expressed to be "free of legacy duty"—Whether estate duty payable on realty specifically devised to be borne by residuary estate—Estate duty—Property passing to executors as such—Freehold mortgaged by demise—Trust of reversion for purchaser of term—Nature of purchaser's*

*interest in property—Merger of estates—Statute of Uses (Ireland)*, 1634 (10 *Car.* 1 *sess.* 2, *c.* 1), *ss.* 1, 7—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9. Premises held under a fee farm grant were mortgaged by way of a demise for 10,000 years to a Bank to secure advances, the mortgagors covenanting to stand seised of the reversion immediately expectant on the term "in trust for any purchaser or purchasers of the premises or to convey and dispose thereof as the Bank or any such purchaser or purchasers may at any time direct". The Bank in exercise of its statutory power of sale sold the premises to S. and thereupon assigned to him the unexpired portion of the term. Neither the Bank nor S. gave any directions to the mortgagors regarding the reversion. S. died and by his will he devised and bequeathed the premises to three persons for life and thereafter to named charities, made a number of specific and pecuniary bequests some of which were expressed to be given "free of legacy duty", and left his residuary estate consisting of realty and personalty to his executors on trust, inter alia, to pay his debts funeral and testamentary expenses and death duties. *Held*, that even if S's interest in the premises were real property the direction to pay death duties out of the residuary estate exonerated the specific devises from the payment of estate duty in respect of the premises. A direction to pay death duties out of residuary estate may extend to cover estate duty on specific devises notwithstanding that the testator has by discriminating between some legacies and others indicated that the direction is not intended to cover legacy duty. *Quaere*, whether S.'s interest in the premises was real property or personal property. Per Porter L.J. The mortgagor's covenant to stand seised of the reversion was not executed by the Statute of Uses since it was an active trust requiring the trustees to convey and dispose as directed. S.'s interest in the term was a legal interest and did not merge in his equitable estate in the reversion, and the premises must accordingly be treated as personalty for estate duty purposes. Per Black L.J. On the true construction of the mortgage deed the mortgagors retained the legal estate in the freehold reversion and S. as purchaser was entitled only to the equitable estate in the reversion. There was no merger of S.'s legal estate in the term and his equitable estate in the reversion, but as the beneficial estate in the term and the beneficial estate in the reversion had become vested in one person the term should be regarded as attendant on the inheritance, and accordingly S.'s interest should be regarded as realty for estate duty purposes. Even if the mortgagor's covenant to stand seised were to be regarded as being executed by the Statute of Uses it would, having been made for a money consideration, be treated as a bargain and sale which would require enrolment as prescribed by the Statute to make it effective as a conveyance of the legal estate. Decision of Lord MacDermott L.C.J. reversed. *In re Sergie, deceased* .. .. .. [C.A. 1

—— CONSTRUCTION 2—*Charity—Gift to be applied to building fund or other religious uses of convent—Validity.* A testatrix bequeathed a pecuniary legacy to the Superioress of the M. Convent "for the purposes of the religious community of the said Convent", and further bequeathed a moiety of the residue on trust to be paid to the Superioress "to be applied to the Building Fund of the said Convent or to such other religious uses for the benefit of the said Community . . . as the Reverend Mother . . . shall consider advisable." It was conceded that as the convent community was not a merely contemplative order the pecuniary legacy for the purposes of the Community was a valid charitable gift. *Held*, that the gift of residue for the benefit of the Community, whether it was charitable or non-charitable, did not offend against the perpetuity rule since, notwithstanding the reference to the building fund, it gave an absolute discretion to the Superioress to spend the money for such religious uses for the benefit of the Community as she considered advisable, and was accordingly a valid gift. *In re Richard, deceased* .. .. [Ch.D. 100

WORDS—
—— "Adapting for sale" . . 54
*See* VALUATION.

—— "wrongful act or default" .. 172
*See* MERCHANT SHIPPING.